Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SYLVIA RODRIGUEZ, individually and on behalf of her minor child, LES ANDREW KELLY,

Petitioners,

-against-

MARJORIE McLOUGHLIN, individually and as Executive Director Cardinal McCloskey Children's & Family Services, and BARBARA McMURRAY, individually and as Foster Boarding Home Director of Cardinal McCloskey Children's & Family Services, and CARDINAL McCLOSKEY CHILDREN'S AND FAMILY SERVICES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether New York statutes and regulations limiting official discretion to remove a child from a home in which the child was placed for adoption give rise to a state-created liberty interest in a long-term foster family where (i) the child was placed with the foster parent for adoption, (ii) the foster parent has raised the child since birth or infancy for a period longer than 12 months, (iii) the rights of the child's natural parents have been legally terminated, and (iv) United States Supreme Court precedent provides that a liberty interest might exist in the substantially less permanent context of short-term foster care placement that is not intended for adoption.

2. Whether a child who has been placed with a foster parent has a liberty interest in the integrity and stability of that family relationship where (i) the child was placed with the foster parent for adoption, (ii) has lived with that foster parent continuously since birth or infancy for a period longer than 12 months, (iii) the rights of the child's natural parents have been legally terminated, and (iv) United States Supreme Court precedent provides that a liberty interest might exist in the substantially less permanent context of short-term foster care placement that is not intended for adoption.

3. Whether a foster parent and child have a liberty interest in the integrity and stability of their long-term, preadoptive family unit arising from the Due Process Clause of the Constitution where (i) the child was placed with the foster parent for adoption, (ii) the foster parent has had the child since birth or infancy for a period

QUESTIONS PRESENTED – Continued

greater than 12 months, (iii) the rights of the child's natural parents have been legally terminated, and (iv) United States Supreme Court precedent provides that a liberty interest might exist in the substantially less permanent context of short-term foster care placement that is not intended for adoption.

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PARTIES TO THE PETITION

Petitioner

Sylvia Rodriguez, individually and on behalf of her minor child, Les Andrew Kelly

Respondents

Marjorie McLoughlin, individually and as Executive Director of Cardinal McCloskey Children's & Family Services

Barbara McMurray, individually as Foster Boarding Home Director of Cardinal McCloskey Children's & Family Services

Cardinal McCloskey Children's & Family Services

New York City Department of Social Services

New York City Child Welfare Administration (now known as the Administration for Children's Services)

City of New York

OPINIONS BELOW

The June 5, 2000 Opinion of the United States Court of Appeals for the Second Circuit is attached herein at Appendix A, page A-1, and is reported at 214 F.3d 328 (2000) (the "Opinion"). The January 8, 1999 Opinion of the United States District Court for the Southern District of New York is attached at Appendix B, page A-30, and is reported at 49 F. Supp.2d 186 (S.D.N.Y. 1999). Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc* ("Petition for Rehearing") was denied on November 1, 2000 in an Unpublished Order attached herein at Appendix C, page A-79.

STATEMENT OF JURISDICTION

Petitioner brings this petition pursuant to 28 U.S.C. § 1257. The jurisdiction of the district court was invoked pursuant to 42 U.S.C. § 1983, as Ms. Rodriguez and Andrew sought damages for the violation of their liberty interest in the integrity, stability and continuity of their long-term, preadoptive foster family.

STATUTES INVOLVED

The following statutes are of primary concern in this case.

A. Restrictions on Removal

- "Efforts to remove a child from the care and custody of a biological parent, *adoptive parent* [defined to include Ms. Rodriguez at the time of the removal], or legal guardian *shall* be undertaken *only* when it is *clearly established* that such action is in such child's best interest." N.Y. Comp. Codes R. & Regs. tit. 18 § 421.2(b) (emphasis added).

B. Custody Regulations

- "*Adoptive parent* means a person with whom a child has been placed for adoption or who

has adopted a child with agency approval." N.Y. Comp. Codes R. & Regs. tit. 18 § 421.1(c) (emphasis added).

- "Any person or persons having *custody* for more than twelve months through an authorized agency *for the purpose of foster care shall* be permitted as a matter of right, as an interested party, to intervene in any proceeding commenced to set aside a surrender purporting to commit the guardianship of the person and custody of a child executed under the provisions of this section. Such intervention may be made anonymously or in the true name of such person or persons *having custody of the child for the purpose of foster care.*" N.Y. Soc. Serv. Law § 383-c(9)(b) (emphasis added).
- "The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded." N.Y. Soc. Serv. Law § 383(2).

C. Procedural Restrictions and Regulations

- "The rights of children, biological parents, legal guardians, foster parents and adoptive families *shall* be respected and protected through responsible agency administration." N.Y. Comp. Codes R. & Regs. tit. 18 § 421.2(c) (emphasis added).
- "Whenever a social services official . . . proposes to remove a child in foster family care from the foster family home, he/

she . . . *must notify the foster family parents, in writing,* of the intention to remove such child. Such notification must be given at least 10 days prior to the proposed effective date of the removal, except where the health or safety of the child requires that the child be removed immediately from the foster family home. . . . Such *notification must further advise the foster family parents that they may request a conference with the social services official* . . . at which time the foster parents, with or without a representative, may appear to have the proposed action reviewed, be advised of the reasons therefore and be afforded an opportunity to submit reasons why the child should not be removed . . . " N.Y. Comp. Codes R. & Regs. tit. 18 § 443.5(a) (emphasis added).

- "In any agreement between an authorized agency and foster parents with whom a child or children are to be placed or boarded, there *shall* be contained therein the following language: 'It is duly acknowledged by the parties hereto that pursuant to the law of the state of New York, a foster parent *shall* have preference in any proceedings to adopt the child subject to this agreement *upon such child having been in the custody of such foster parent for a period in excess of twelve months.*' " N.Y. Soc. Serv. Law § 374(1-a) (emphasis added).
- "Any person or persons having custody *for more than twelve months through an authorized agency for the purpose of foster care shall* be permitted as a matter of right, as an interested party, to intervene in any proceeding commenced to set aside a surrender purporting to commit the guardianship of the person and custody of a child executed under the

provisions of this section." N.Y. Soc. Serv. Law § 383-c(9)(b).

- "Notice of the hearing [to review the foster care status of a child], including a statement of the dispositional alternatives of the court *shall* be served upon . . . (c) the foster parent or parents in whose home child resided or resides at or after the expiration of a continuous period of 12 months in foster care." N.Y. Soc. Serv. Law § 392(4)(c) (emphasis added).
- "Any adult husband and his adult wife and any adult unmarried person, who, as foster parent or parents, have cared for a child *continuously for at least twelve months* or more, may apply to such authorized agency for the placement of said child with them for the purpose of adoption, and if said child is eligible for adoption, the agency *shall give preference* and first consideration to their application over all other applications for adoption placements . . . " N.Y. Soc. Serv. Law § 383(3) (emphasis added).
- "Authorized agencies *must* . . . inform the foster parents that a child in their care who is free or to be freed for adoption and inform foster parents who have not completed an application to become adoptive parents of the procedure for applying to adopt the child." N.Y. Comp. Codes R. & Regs. tit. 18 § 421.19(a)(1) (emphasis added).
- "[A] petition to review the foster care status . . . may be filed by the foster parent or parents in whose home the child resides or has resided during such period of twelve months." N.Y. Soc. Serv. Law § 392(2)(c).
- "An adoption subsidy is available for parents who adopt 'hard to place children.' [T]he child is hard to place . . . because he/she has

> been in care with the same foster parent(s) for 18 months or more prior to the signing of the adoption placement agreement by such foster parent(s) and has developed a strong attachment to his/her foster parent(s) while in such care, and separation from the foster parent(s) would adversely affect the child's development." N.Y. Comp. Codes R. & Regs. tit. 18 § 421.24(3)(f).

STATEMENT OF THE CASE

This case involves the rights of a specifically defined class of long-term foster families: those in which (i) a child was placed for adoption, (ii) the foster parent has raised the child since birth or infancy for a period longer than 12 months, and (iii) the rights of the child's natural parents have been legally terminated. Sylvia Rodriguez and her foster (now adopted) son Andrew were both members of this class.

Andrew was born on March 13, 1990 and was immediately abandoned by his biological mother. Ms. Rodriguez became Andrew's foster mother when he was only 13 days old. She raised him for four years, until he was removed unexpectedly by the foster care agency from her home. Ms. Rodriguez was the only mother Andrew had ever known, and the two had developed a close, loving relationship as mother and son.

Early in this relationship, Ms. Rodriguez expressed an interest in adopting Andrew, and by February 1992, the Child Welfare Association ("CWA") (now known as the Administration for Children's Services) of the City of New York (the "City") designated Ms. Rodriguez's home as the "preadoptive" home for Andrew. As a major step towards Andrew's adoption by Ms. Rodriguez, Andrew's natural mother's parental rights were legally terminated. By March 1994 (the month of Andrew's removal), all adoption papers had been filed for Andrew's adoption,

and the City, CWA, the foster care agency and Ms. Rodriguez were all awaiting the finalization of the adoption process.

On March 1, 1994, only weeks prior to the finalization of his adoption, Andrew was removed from Ms. Rodriguez's home due to an isolated incident in which Andrew was found unsupervised by an adult. Ms. Rodriguez did not contest the validity of the removal at trial or on appeal.

Despite various regulations mandating that foster parents be provided with both written notice of removal and an opportunity to contest the removal, the respondents failed to provide Ms. Rodriguez with either of these procedural protections for almost four months. Respondants also prohibited Ms. Rodriguez from visiting Andrew during that nearly four-month period, despite her repeated pleadings to do so. During this time, Ms. Rodriguez had no contact with Andrew and no opportunity to contest the removal. In June of 1994, Ms. Rodriguez was finally provided with written notice of removal, a hearing, and one half-hour of supervised visitation with Andrew. Based on evidence presented at the hearing, the Independent Review Officer ordered Andrew to be returned to Ms. Rodriguez.

After Ms. Rodriguez and Andrew were reunited, they brought suit under 42 U.S.C. § 1983, seeking damages for the violation of their liberty interest in their long-term, preadoptive foster family. In a detailed Opinion and Order dated January 8, 1999, the district court (Wood, J.) held that Ms. Rodriguez and Andrew had a liberty interest in the stability of their long-term, preadoptive foster family, entitling them to procedural due process protection. The district court held that, although the decision to remove Andrew from Ms. Rodriguez's home under emergency circumstances was objectively reasonable, prompt written notice of removal, an opportunity to be heard to contest the removal and visitation, were improperly withheld.

On appeal, the Second Circuit reversed the district court's judgment and remanded the case to the district court with instructions to dismiss the complaint. The Second Circuit recognized, however, that were a liberty interest to exist in this type of family, due process would be lacking, because (as the City and CWA conceded on appeal) Ms. Rodriguez and Andrew were not provided a timely and meaningful opportunity to contest the removal and improperly were denied visitation. *Rodriguez v. McLoughlin*, 214 F.2d 328, 341 (2d Cir. 2000) (A-28). In an order dated November 1, 2000, the Second Circuit denied the Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I.

THE IMPORTANCE OF THIS CASE

The Second Circuit's Opinion in this case is the death knell to any and all due process liberty interests for foster care families, even if the family has been together for years and is on the verge of adoption. The Opinion conclusively establishes that every foster family in New York must live in fear that it may be torn apart and denied a timely and meaningful opportunity to contest that involuntary separation. According to the Second Circuit, these families have no protected liberty interest to afford them any remedy for the denial of their procedural due process protections. The Second Circuit ignores the realities of life in America today – that parties in a foster family develop deep and meaningful emotional ties, particularly when a mother and child have been together since birth. The opinion is inconsistent with the Supreme Court's decision in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) ("OFFER"), which suggested that, at a minimum, some form of "limited" liberty interest for foster families arises from New York state law. 431 U.S. at 846.

The Opinion has a wide-ranging social impact – it denies basic Constitutional rights to thousands of foster families in preadoptive relationships (and for every other foster family in New York). In April 2000, in New York, there were 2,875 children living in a preadoptive foster home with a signed adoptive placement agreement; and 13,500 foster children had the goal of adoption. Nina Bernstein, *Ruling Limits Some Foster Parents' Rights*, N.Y. Times, June 9, 2000, at B-3 (copy attached hereto at Appendix D, page A-80). On a national level, over half a million children in this country are currently in the foster care system. Of these children, approximately 19,463 were in preadoptive homes and over 105,000 were not yet in preadoptive homes, but had the goal of adoption. U.S. Dep't of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *The AFCARS Report* (1999) <www.acf.dhhs.gov/programs/cb> (copy attached hereto at Appendix E, page A-85). By the Second Circuit's Opinion, none of the foster families in New York have any procedural due process rights to protect the integrity and stability of their family. The Second Circuit's "hopes" that preadoptive foster families will not be mistreated. But such "hopes" did not protect Ms. Rodriguez and Andrew, who were grievously wronged and who were left without a remedy. *See Rodriguez*, 214 F.2d at 341 (A-29).

The Second Circuit's Opinion ignores that the traditional nuclear family no longer exists for many people and that the definition of a family no longer depends solely on blood relations. This Court itself recently recognized the "changing realities of the American family," and that "[t]he demographic changes of the past century make it difficult to speak of an average American family." *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000). Indeed, the Court noted that there has been an "erosion

[ ] of the modern 'nuclear family.' " *Troxel*, 530 U.S. at ___, 120 S. Ct. at 2059.

This Court has recognized the importance of family even in the absence of a blood relationship:

> "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promoting a way of life' through the instruction of children. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and child in his or her care may exist *even in the absence of a blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family*. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals."

OFFER, 431 U.S. at 844 (emphasis added).

This Court has recognized something that the Second Circuit has ignored – that the bonds established among members of long-term foster families are just as deep and enduring as in a biological family. This Court now has the opportunity to rule on the protectability of the liberty interest formed by this type of foster family, and to affirm the procedural due process protections owing to these non-traditional but cohesive and loving family units.

II.

THE SECOND CIRCUIT'S OPINION CONFLICTS WITH SUPREME COURT PRECEDENT

The Second Circuit's Opinion conflicts with Supreme Court precedent in two ways. First, the Opinion is in conflict with *OFFER*, as it forecloses the possibility of any liberty interest even for long-term, preadoptive foster families. Second, the Opinion conflicts with Supreme Court precedent regarding liberty interests that arise from the Due Process Clause itself.

A. The Second Circuit's Opinion Conflicts with the Supreme Court's Decision in *OFFER*

The Second Circuit's denial of procedural due process rights to a long-term, preadoptive foster family conflicts with this Court's earlier decision in *OFFER*. In *OFFER*, in the context of voluntary foster care placements which were not intended to lead to adoption, this Court considered New York's foster care regulations for planned removals. *OFFER*, 431 U.S. at 816. The Court suggested that a limited liberty interest may exist in the integrity and stability of foster families in which the child was not to be adopted. *Id.* at 846, 847, 853, 854, 856.

In *OFFER*, a class of long-term foster parents claimed that New York foster care regulations for planned removals violated their rights to procedural due process. *Id.* at 816. The foster care context considered in *OFFER* was non-adoptive foster care placement, which the Court recognized is "unlike adoptive placement, which implies a permanent substitution of one home for another." *Id.* at 824 & n.8. Unlike the instant case, the foster children in *OFFER* had been placed in foster care voluntarily by their natural parents, the natural parents' parental rights had not been legally terminated (so the child had not been freed for adoption), and the foster parents had not signed Adoptive Placement Agreements. *Id.* at n.1.

Even in this non-adoptive context in which the child could be removed from foster care and placed back in a home with his or her natural parents, the Court discussed whether the foster families possessed a liberty interest in the integrity and stability of their relationship. Although the Court did not ultimately rule on this issue, the Court did assume that such an interest existed in order to determine whether New York's procedures for removal were adequate. The Court's discussion of this liberty interest indicated that it did not want to foreclose the possibility that some foster families (even non-adoptive foster families) are entitled to procedural due process rights. The Court provided much guidance upon which to find that Ms. Rodriguez and Andrew possess a liberty interest in the integrity, stability and continuity of their long-term, preadoptive family.

The Court in *OFFER* stated that:

- "The assumed liberty interest to be protected in this case is one rooted in the emotional attachments that develop over time between a child and the adults who care for him." *Id.* at 854.
- "Whatever liberty interest may be argued to exist in the foster family is significantly weaker in the case of removals preceding return to the natural parent, and the balance of due process interests must accordingly be different." *Id.* at 853.
- "[T]he limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty' in the foster family." *Id.* at 846.

Thus, the Court suggested that there may be some type of protectable liberty interest even for non-preadoptive foster families, despite their limited expectations of permanency. In fact, the Court was so clear in its refusal

to preclude the idea that foster families have a limited liberty interest that the concurrence noted that:

> "I cannot understand why the Court thinks itself obliged to decide these cases on the assumption that either foster parents or foster children in New York have some sort of 'liberty' interest in the continuation of their relationship. Rather than tiptoeing around this central issue, I would squarely hold that the interests asserted by the appellees are not of a kind that the Due Process Clause of the Fourteenth Amendment protects."

Id. at 857-58.

If this Court was willing to assume that there is a small liberty interest in short-term foster families in which adoption is not contemplated, then one would expect the Court to find that an even greater liberty interest exists for the long-term foster family where the child has been placed with the foster family for the purposes of adoption and has lived with that family since infancy.

The Second Circuit Opinion conflicts with this Court's decision in *OFFER*, in ruling that long-term, preadoptive foster parents who have cared for a child since infancy for a period longer than twelve months have absolutely no liberty interest in the stability or continuity of their foster care family. Instead of heeding the Court's distinction between temporary and preadoptive foster care, the Second Circuit chose to treat a child in a preadoptive foster care home as it might treat a child in temporary, non-adoptive foster care. Clearly, Ms. Rodriguez's and Andrew's liberty interests ought to be *more* significant, not less, than the interest potentially held by the foster families in *OFFER*.

B. The Second Circuit's Opinion Conflicts with Supreme Court Precedent Regarding Liberty Interests Arising from the Due Process Clause

The Supreme Court has traditionally held that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights [the Supreme] Court has ranked as 'of basic importance in our society,' . . . rights sheltered by the Fourteenth Amendment against the State's unwanted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (internal citation omitted); *see also Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982); *OFFER*, 431 U.S. at 842, 845; *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925).

In *OFFER*, the Supreme Court explained that, to determine whether a liberty interest in the integrity and stability of a foster family may be found based on the Due Process Clause itself, the important inquiry is whether "the relation of foster parent to foster child [is] sufficiently akin to the concept of 'family' recognized in our precedents to merit similar protection" to that normally accorded to "families." 431 U.S. at 842. Thus, cases involving the liberty interests of biological families are the natural and proper starting point for any analysis of a claimed liberty interest in the foster family.

In attempting to define "family" for purposes of due process protection, the Supreme Court in *OFFER* affirmed that "biological relationships are not the exclusive determination of the existence of a family." *Id.* at 843. This Court's opinion in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925), supports the principle that family is not limited to biological families. In *Pierce*, this Court struck down an Oregon statute requiring "[a]ny parent, guardian *or other person* . . . having *control or charge or custody* of a child" to send the child to public, rather than private, schools. *Id.* at 530 n.1

(emphasis added). In holding that the statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control," the Court did not focus on biology, or even legal custody, as the source of the liberty interest, but on the fact that "those who nurture [a child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 534-35.

Similarly, the Court explained in *OFFER* that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association. . . . " 431 U.S. at 844 (internal citation omitted). The Court further acknowledged that the emotional bonds formed within long-term foster families such as Ms. Rodriguez's and Andrew's may equal those of natural families:

> "[A] deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. *At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.*"

Id. at 844 (emphasis added) (citation and footnotes omitted).

Recognition of a liberty interest in a long-term preadoptive foster family is also consistent with a long history of other precedents affording legal recognition to "functional" family relationships in various contexts. As the Second Circuit stated, "[*t*]*he policy of our law has*

always been to encourage family relationships, even those foster in character." Banks v. United States, 267 F.2d 535, 539 (2d Cir. 1959) (emphasis added).

Guided by *OFFER*, courts have found a Due Process Clause-based liberty interest in a foster family relationship where the family at issue was, in substance, equivalent to a "natural" family, noting that limiting the Fourteenth Amendment's protection of "family rights" only to biological families is unrealistic. *See Brown v. County of San Joaquin*, 601 F. Supp. 653, 664-65 (E.D. Cal. 1985) (holding that plaintiff had a liberty interest in her foster family relationship rooted in the Fourteenth Amendment's broad protection of "liberty" because "the foster parent-foster child relationship ha[d] precisely the same form and content as a healthy biological parent-child relationship"); *Berhow v. Crow*, 423 So.2d 371, 372-73 (Fla. Dist. Ct. App. 1982) (where a foster child lived with her foster parents most of her life, the foster parents, although not biologically related to the child, had a fundamental liberty interest in preserving their familial relationship based on the Due Process Clause); *James v. McLinden*, 341 F. Supp. 1233, 1235 (D. Conn. 1969) ("There is no sound reason to deny a person who has voluntarily assumed the obligations of parenthood over a child the same basic rights to due process a natural or legal parent possesses when the state intervenes to disrupt or destroy the family unit.").

The New York state courts have also granted legal recognition to non-biological and non-adoptive families. *See Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 211, 543 N.E.2d 49, 53-54, 544 N.Y.S.2d 784, 788-89 (1989) ("Family, [for purposes of the statute], *should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order.* The intended protection against sudden eviction *should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of*

family life. . . . This view . . . comports both with our society's traditional concept of 'family' and with the expectations of individuals who live in such nuclear units.") (emphasis added); *Group House of Port Washington, Inc. v. Board of Zoning and Appeals*, 45 N.Y.2d 266, 272, 380 N.E.2d 207, 209-10, 408 N.Y.S.2d 377, 379-80 (1978) (holding that a group foster care facility must be included in a zoning regulation's definition of "family" where the home was indistinguishable from a natural family); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 306, 313 N.E.2d 756, 758-59, 357 N.Y.S.2d 449, 453 (1974) (same).

Significantly, where a child's biological parents are absent, the New York legislature and courts have exhibited a strong preference for having a child remain with "de facto" parents such as long-term foster parents, rather than placing the child with other biological relatives. *See In re Guardianship of D. Children*, 177 A.D.2d 393, 393, 576 N.Y.S.2d 136, 137 (1st Dep't 1991) (granting custody of children to foundling hospital for adoption by foster mother who had devoted herself to care of children since infancy, and was loved by them, rather than granting custody to biological grandmother), *appeal dismissed*, 79 N.Y.2d 911, 590 N.E.2d 247, 581 N.Y.S.2d 662 (1992); *rearg. denied*, 79 N.Y.2d 978, 592 N.E.2d 804, 583 N.Y.S.2d 196 (1992); *In re Adoption of A.*, 158 Misc.2d 760, 765, 601 N.Y.S.2d 762, 766 (Fam. Ct. N.Y. Co. 1993) (holding that biological relatives with recent and tenuous connection to child have right to petition for adoption, but their suitability as adoptive parents should not be equated with that of a foster parent of long-standing duration).

In sum, the starting point for determining whether a liberty interest exists arising from the Due Process Clause is whether, in substance, a foster family is sufficiently like a natural family. In the context presented by this case, where a foster child has lived with a foster parent since birth and has never known his biological parents, such strong familial ties exist in the foster family that, as stated

by the Court in *OFFER*, *"we cannot dismiss the foster family as a mere collection of unrelated individuals."* 431 U.S. at 844 (emphasis added). These particular foster families are entitled to due process protections based on the Due Process Clause itself.

III.

DIFFERING OUTCOMES AMONG THE CIRCUITS SHOULD BE RECONCILED BY THIS COURT

In determining whether a liberty interest has been created in the continuity and stability of a foster family, federal courts looking to state law have applied two different standards, and have reached conflicting results. The first standard, developed in the context of prisoners' rights cases, is a rigid statutory analysis which turns on whether the statutes at issue contain mandatory language, and provide substantive predicates, limiting official discretion to deprive someone of a benefit. The second, more flexible standard, looks more generally to whether an expectation of permanency has been created in the foster family relationship by virtue of the preference afforded to these families.

A. The Circuit Split with Respect to the Mandatory Language and Substantive Predicates Standard

The Second Circuit's Opinion in *Rodriguez* is in direct conflict with a Third Circuit decision, *McLaughlin v. Pernsley*, 693 F. Supp. 318 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3d Cir. 1989). Both cases address the procedural due process liberty interests of foster families arising from state statutes and regulations, based on whether such statutes and regulations place substantive limits on official discretion. Under this analysis, to create a liberty interest, a statute or regulation must "contain 'explicitly

mandatory language,' *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 463 (1989).

The Third Circuit in *McLaughlin* held that the plaintiff foster parents had a liberty interest in their foster family relationship under this standard, based on expectations created by Pennsylvania law. 693 F. Supp. 318. The foster child in *McLaughlin* was placed in the foster home when he was only five months old. Although the original placement was for emergency, short term foster care, the Department of Human Services extended the child's stay, and he remained in the foster home for two years, bonding significantly with the McLaughlins. 693 F. Supp. at 320-21.

Despite this bonding, the state defendants removed the child without providing the McLaughlins written notice or a hearing prior to the removal. The court held that the McLaughlins' success on their due process claim was "inescapable," because a liberty interest arose from the Pennsylvania statutory scheme. *Id.* at 326-27.

The Pennsylvania regulations that gave rise to this liberty interest provided that: (1) *qualified* foster parents may appeal the relocation of a child from a foster family home; (2) foster parents *must* be informed in writing that they may appeal the relocation of a child at least 15 days prior to the relocation; and (3) if a foster parent appeals the relocation, the child *must* remain in the foster family home pending a decision on appeal. *Id.* at 325-26.

The court concluded that the use of explicitly mandatory language in the statute (*i.e.*, the agency "shall" inform foster parents that they may appeal a decision, and the child "must" remain in the home pending a decision on the appeal), as well as specific substantive predicates (the statute applied only to "qualified" foster

parents), "demands the conclusion that the State has created a protected liberty interest" in the plaintiffs' foster family relationship. *Id.* at 326.

Like the Pennsylvania regulations discussed in *McLaughlin*, New York's foster care statutes and regulations contain mandatory language and place explicit limitations on the removal of a child from preadoptive foster care placement. The New York regulations provide that "[e]fforts to remove a child from the care and custody of a biological parent, *adoptive parent* [defined to include Ms. Rodriguez at the time of the removal], or legal guardian *shall* be undertaken *only* when it is *clearly established* that such action is in such child's best interest." N.Y. Comp. Codes R. & Regs. tit. 18 § 421.2(b) (emphasis added). New York statutes further provide that foster parents who have had continuous care of a child for more than twelve months "*shall* be" entitled to intervene in any proceeding involving the child as a matter of right. N.Y. Soc. Serv. Law § 383-c(9).

Despite the mandatory language and substantive predicates used within these statutes and regulations, the Second Circuit nonetheless held that "none of the statutory or regulatory sections called to our attention contains any substantive predicates or explicitly mandatory language giving directives to decisionmakers as to the cohabitation or visitation rights of a foster mother and child in the wake of an emergency removal of the child from the foster home." *Rodriguez*, 214 F.3d at 341; A-27. The Opinion directly conflicts with the Third Circuit's decision in *McLaughlin*, a case with similar facts and statutes, which held that "the State ha[d] created a protected liberty interest" in the plaintiffs' foster family relationship. 693 F. Supp. at 326.

B. The Circuit Split with Respect to Courts' Analyses of Expectations of Permanency

This Court in *OFFER* advised that courts should look to expectations of permanency to determine whether a liberty interest exists. In recognizing that a limited liberty interest may exist even for a *short term* foster family, the Court stated that "it is appropriate to ascertain from state law the *expectations and entitlements of the parties.*" *OFFER* at 845-46 (emphasis added). This is a less stringent standard than the "substantive predicate"/"explicit mandatory language" standard in *Kentucky Dep't of Corrections*. The "substantive predicate" analysis, which limits official discretion, arose and has largely been applied in the prison context. In that context, regulations are not "designed to confer rights," but rather "primarily designed to guide correctional officials in the administration of a prison." *Sandin v. Conner*, 515 U.S. 472, 481-82 (1995). Thus, in the preadoptive foster care context, which is perhaps the antithesis of the prison environment, while a liberty interest may be found based on the "substantive predicate" analysis, it is entirely reasonable to embrace a broader expectations-based analysis.

In fact, relying on this Court's decision in *OFFER*, many courts have applied this less restrictive "expectations of permanency" test in the foster care removal context. The Tenth Circuit in *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1989), while not explicitly deciding whether the plaintiff preadoptive foster family had a liberty interest in their relationship, emphasized that preadoptive placement with a foster parent creates reasonable expectations of permanency "meriting limited due process protection." The court noted the special nature of the preadoptive foster family:

> *"The preadoption agreement in this case differs significantly from a typical foster agreement because a preadoption placement represents an attempt to find a permanent, stable home for children.* Foster care

> agreements, in contrast, typically involve temporary care during a transitional period of a child's life, and for this reason some courts have refused to accord constitutional protection to foster family relationships."

Spielman, 873 F.2d at 1384. The fact that the natural parents' parental rights had been terminated was also significant to the preadoptive foster family's expectations of permanency. *Id.* at 1384.

Also recognizing the importance of expectations of permanency, in *Thelan v. Catholic Soc. Servs.*, 691 F. Supp. 1179, 1185 (E.D. Wis. 1988), the court held that prospective adoptive parents and their preadoptive child had a constitutionally protected liberty interest in their family unit based on their legitimate state-created expectation that their relationship would be permanent. The *Thelan* court affirmed that the difference in expectations held by short-term, non-permanent foster parents and those held by preadoptive parents was dispositive:

> *"Unlike the foster parents, the prospective adoptive parents cannot be said to expect that their relationship with the child will be ended.* To the contrary, the very motive of the prospective adoptive parents, as well as the State, is to secure a life-long relationship between the adoptive parents and the child. . . . *Although no legal guardianship of the child has changed at this time, there can be little doubt that the expectation of the prospective adoptive parents . . . will be that the child eventually will be theirs forever."*

Thelan, 691 F. Supp. at 1184 (emphasis added). The court therefore held that the plaintiffs had a liberty interest in their preadoptive family, entitled to procedural due process protection.

Similarly, in *Brown*, 601 F. Supp. at 658, the court recognized that "[t]he first and paramount goal of California law is the reunification of children with their natural parents," and that foster care is intended, in the first

instance, to be a temporary method of care until children could be reunited with their parents. However, once the goal of reunification has been abandoned in favor of finding a permanent and stable home for the child, California law "recognizes and affords protection to the interest of foster parents and foster children in an enduring relationship." *Id.* at 659.

The following provisions of California law led to an expectation of a protected liberty interest in a foster family relationship: (1) foster parents are entitled to participate in all juvenile court proceedings affecting the placement of the child; (2) in fashioning a permanency plan for the child, the juvenile court is prevented from freeing a child for adoption or seeking permanent guardianship for the child if the child is living with a beloved, loving, responsible foster parent who is nevertheless ineligible to adopt or become a legal guardian for the child; and (3) foster parents to whom the child is deeply attached are entitled to preferential consideration as adoptive parents. *Id.* at 659-60. Based on these statutory entitlements, the court concluded that "both foster parents and foster children are permitted by California law to expect an enduring relationship once efforts at [biological] familial reunification have been abandoned." *Id.* at 661.

In contrast, in cases where the relationship between the child and the foster family are not intended to be permanent, courts have held that there is no expectation of permanency and thus no liberty interest in the integrity and stability of the family. *See Sherrard v. Owens*, 484 F. Supp. 728, 742 (W.D.Mich. 1980), *aff'd*, 644 F.2d 542 (6th Cir. 1981), *cert. denied*, 454 U.S. 828 (1998) (foster parents had no reasonable expectation of permanency where they held only a provisional, six-month "trial" foster care license, the children had not been placed with the foster parents at infancy, and the children had known other parents); *Drummond v. Fulton County Dep't of Family and*

Children's Servs., 563 F.2d 1200, 1206-07 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978) (plaintiffs had no reasonable expectation of permanency based on the fact under the Georgia foster care system, "children are placed in foster homes . . . for what is clearly designed as a transitional phase in the child's life"); *Kyees v. County Dep't of Pub. Welfare*, 600 F.2d 693, 698 (7th Cir. 1979) (no constitutionally protected liberty interest where "the likelihood or virtual certainty of eventual termination of the foster relationship is made clear in state statutes and in the contracts executed by the foster parents"); *Renfro v. Cuyahoga County Dep't of Human Servs.*, 884 F.2d 943, 944 (6th Cir. 1989) (foster parents had no protectable liberty interest because Ohio law [unlike New York law in this case] gave clear notice to foster parents that foster care is temporary and that their rights are limited, as it provided no mechanism to challenge removal of foster children, no statutory right to a pre- or post-removal hearing and no written explanation for agency's actions); *DeWees v. Stevenson*, 779 F. Supp. 25, 28 (E.D. Pa. 1991) (foster parents did not have a cognizable liberty interest in maintaining a relationship with a foster child vis-à-vis prospective adoptive parents, where plaintiffs were informed that foster child's placement would be temporary and they would not be approved as adoptive parents).

In other cases, courts in other circuits have based their finding that no liberty interest existed in the foster family on the fact that the biological parent or guardian retained an interest in the child. *See Procopio v. Johnson*, 994 F.2d 325, 329 (7th Cir.); *Wildauer v. Frederick County*, 993 F.2d 369, 373 (4th Cir. 1992); *Gibson v. Merced County Dep't of Human Resources*, 799 F.2d 582, 590 (9th Cir. 1986); *Engstrom v. State*, 461 N.W.2d 309, 318-19 (Iowa 1990).

The lower court in this case correctly heeded this Court's guidance in *OFFER* by considering the broader "expectations and entitlements" of the long-term foster family, as other circuits have done. *Rodriguez v.*

McLoughlin, 49 F. Supp. 2d 186, 195-98 (S.D.N.Y. 1999) (A-48-56). The Second Circuit Opinion rejected this analysis. This Court should clarify that this broader analysis was and is appropriate.

IV.

THE COURT BELOW ERRED IN ITS REASONING

The Second Circuit erred in its Opinion on two main grounds. First, it misread N.Y. Comp. R. & Regs. tit. 18 § 421.2(b) ("§ 421.2(b)") in a way that renders meaningless part of the regulation – the part that protects long-term, preadoptive foster parents. Second, it failed to address Andrew's independent liberty interest in his relationship with Ms. Rodriguez.

A. The Second Circuit Erred in Interpreting the Relevant Statutes and Regulations

The Second Circuit determined that any liberty interest in the integrity and stability of Ms. Rodriguez and Andrew's family must arise from state law. *Rodriguez*, 214 F.3d at 337; A-18. Accordingly, the court reviewed eight New York State regulations relied upon by the district court and found that none of them supplied the necessary limitations on the exercise of official discretion sufficient to give rise to a state-created liberty interest – *i.e.*, none used mandatory language coupled with "substantive predicates for, or substantive limitations on, the exercise of official discretion with respect to matters of removal or visitation." *Rodriguez*, 214 F.3d at 340 (A-25).

The court next considered § 421.2(b), which provides:

> "[E]fforts to remove a child from the care and custody of his biological parent, adoptive parent, or legal guardian shall be undertaken only when it is clearly established that such action is in such child's best interest."

The court appeared to recognize that § 421.2(b) would give rise to a liberty interest provided the individual relying on the regulation was within the class of people protected by it. Indeed, § 421.2(b) provides that removal "*shall* be undertaken *only when it is clearly established that such action is in such child's best interest*" – "shall" providing the mandatory language, and the substantive predicate being that the state may not remove the child unless it is "clearly established" to be in the child's best interest.

While the Second Circuit found that Ms. Rodriguez was within the class of people the statute was designed to protect – "adoptive parents" – the Court nonetheless held that the protections afforded by § 421.2(b) did not apply to Ms. Rodriguez because Andrew was in the "custody" of respondents, and thus was not removed from Ms. Rodriguez's "care and custody." *Rodriguez*, 214 F.3d at 340-41 (A-26). The court relied on the fact that the Adoptive Placement Agreement between McCloskey and Ms. Rodriguez, by which Ms. Rodriguez had officially expressed her intention to adopt Andrew, stated that "legal custody" of the foster child remained with respondents until the adoption was finalized. *Id.* at 340-41 (A-26).

The court's reading of "care and custody" in § 421.2(b) to mean "care and *legal* custody" renders the regulation meaningless to a subset of "adoptive parents" – namely, foster parents with whom a child has been placed for adoption. Indeed, no foster parent who is an "adoptive parent" could ever be protected by the regulation under the court's analysis, since an "authorized agency" – not the foster parent – always retains legal custody of the child. *See*, N.Y. Soc. Serv. Law § 383(2) (McKinney 1992). Thus, interpreting "care and custody" in § 421.2(b) to mean care and legal custody, instead of care and physical custody, leads to a nonsensical result by nullifying the regulation's protection of an entire segment of "adoptive parents."

Furthermore, the notion of non-legal (*i.e.*, physical) custody is soundly supported in the foster care regulations, which in no uncertain terms provide that, notwithstanding that legal custody always remains with the child welfare agency until the moment of adoption, foster parents have "custody" from the outset of the foster care relationship. The regulations provide:

- "Any *person or persons having custody for more than twelve months through an authorized agency for the purpose of foster care* shall be permitted as a matter of right, as an interested party, to intervene in any proceeding commenced to set aside a surrender purporting to commit the guardianship of the person and custody of a child executed under the provisions of this section. Such intervention may be made anonymously or in the true name of such person or persons *having custody of the child for the purposes of foster care.*" N.Y. Soc. Serv. § 383c(9)(b) (McKinney 1992) (emphasis added).
- "In any agreement between an authorized agency and foster parents with whom a child or children are to be placed or boarded, there shall be contained therein the following language: 'It is duly acknowledged by the parties hereto that pursuant to the law of the state of New York, a foster parent shall have preference in any proceedings to adopt the child subject to this agreement upon such child *having been in the custody of such foster parent for a period in excess of twelve months.*' " N.Y. Soc. Serv. Law § 374(1-a) (McKinney 1992) (emphasis added).

The distinction between legal and physical custody in the foster care context is also recognized in the case law. *See, e.g., Ninesling v. Nassau County Dep't of Soc. Servs.*, 46 N.Y.2d 382, 389, 386 N.E.2d 235, 239, 413

N.Y.S.2d 626, 630 (1978) (contrasting foster parents "who seek to retain custody" for purposes of adoption with the social services agency "charged with legal custody"); *Williams v. Windham Child Care*, 55 A.D.2d 146, 147-48, 389 N.Y.S.2d 860, 861 (1st Dep't 1976) (contrasting "custody" of foster parent with "legal custody," which concededly remains with the agency at all times).

In short, for § 421.2(b) to make sense, "care and custody" can only mean care and physical custody, as opposed to care and legal custody. Otherwise, § 421.2(b) could never apply to an entire subset of adoptive parents. If the Legislature wanted to exclude foster parents from the definition of "adoptive parents," it could have done so. But it did not do so. The Second Circuit misread and misapplied the regulations.

Most significantly, since § 421.2(b) gives rise to a liberty interest for adoptive parents *with* "care and custody" of the child, had the Second Circuit properly read the regulation, it would have inescapably concluded that Ms. Rodriguez and Andrew had a liberty interest entitling them to procedural due process upon Andrew's removal. Thus, the harsh and wide-ranging impact the Second Circuit's Opinion hinges on an improper technical reading of a regulation.

B. The Second Circuit Erred in its Failure to Acknowledge Andrew's Independent Liberty Interest in His Relationship with Ms. Rodriguez

In its Opinion, the Second Circuit also erred in its failure to consider Andrew's own liberty interest in the integrity and stability of his family, which is distinct from that of Ms. Rodriguez.

In *Duchesne v. Sugerman*, in the context of the removal of biological children, the Second Circuit expressed that the right "to have the preservation of family integrity encompasses the reciprocal rights of both parent and

children." 566 F.2d 817, 825 (2d Cir. 1977). The court in *Duchesne* quoted *OFFER*, explaining that children have a right in "not being dislocated from the emotional attachments that derive from the intimacy of daily association with the parent." 566 F.2d at 825 (quoting *OFFER*, 431 U.S. at 844).

In *Rivera v. Marcus*, 696 F.2d 1016, 1025 (2d Cir. 1982), the Second Circuit recognized the liberty interest of children in maintaining the stability of their home:

> "The Ross children surely possess a liberty interest in maintaining, free from arbitrary state interference, the family environment that they have known since birth. . . . If the liberty interest of children is to be firmly recognized in the law, we must ensure that due process is afforded in situations like that presented here where the state seeks to terminate a child's long-standing familial relationship."
>
> *Rivera*, 696 F.2d at 1026.

Courts have long recognized that "when the State takes a person into its custody . . . the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being." *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). This principle has regularly been held to apply to foster children. *See Norfleet ex rel. Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 291 (8th Cir. 1993); *Yvonne L. ex rel. Lewis v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 892-93 (10th Cir. 1992); *K.H. through Murphy v. Morgan*, 914 F.2d 846, 849-50 (7th Cir. 1990); *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990), *cert. denied*, 498 U.S. 867 (1990); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (en banc), *cert. denied*, 489 U.S. 1065 (1989); *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134, 141-42 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983); *Marisol A. ex rel. Forbes v. Guiliani*, 929 F. Supp. 662, 674-75 (S.D.N.Y. 1996),

cert. denied, 520 U.S. 1211 (1997); *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1008-10 (N.D. Ill. 1989).

The right of those in state custody to "expect beneficial and nonarbitrary treatment . . . at [the] hands [of the state]," *Sinhogar v. Parry*, 53 N.Y.2d 424, 444 (1981) (Fuschberg, J., dissenting in part), is particularly vital as applied to the child welfare system. Children in foster care are people who did not come into the state's care by choice but are nevertheless wholly dependent on the state to provide them with life's necessities and to protect them from harm. *See LaShawn A. v. Dixon*, 762 F. Supp. 959, 992-93 (D.D.C. 1991), *aff'd*, 990 F. 2d 1319 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 1944 (1994). In exercising the awesome authority to remove a child from his natural family and place him in a state-regulated foster home, the state must incur an obligation to avoid putting these children at significant risk of harm. *See Maldonado v. Josey*, 975 F.2d 727, 733-34 (10th Cir. 1992) (Seymour, J., concurring) ("state foster care is a situation in which the state, by shouldering the responsibility to care for children, incurs an affirmative constitutional duty to insure their reasonable safety"); *cert. denied*, 507 U.S. 914 (1993). This right is not limited to safety from physical harm, but also extends to protection from emotional and psychological harm. *See Marisol A.*, 929 F. Supp. at 675; *LaShawn A.*, 762 F. Supp. at 992; *Carey v. Piphus*, 435 U.S. 247, 263-64 (1978); *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989); *Aristotle P.*, 721 F. Supp. at 1009-10.

The court in *Brown* similarly recognized that from the point of view of the child, biology cannot determine the existence of a parent-child relationship:

> "[I]t is obvious that a very young foster child is incapable of knowing that the foster parent-foster child relationship is different from a biological parent-child relationship. No one can caution an infant against loving the individual who provides for all of his needs, physical and emotional . . . no one can instruct the infant

> foster child that his foster parent is not his real or natural parent; no one can diminish the infant foster child's feelings toward his foster parent and cause them to be distinguished from the feelings of an infant child to his natural parents."

601 F. Supp. at 665 (internal citations omitted).

Andrew's interest in maintaining the integrity and stability of his familial relationship, and the effect on him of an abrupt separation from the only family he has ever known, was no less powerful because of his lack of a biological tie with Ms. Rodriguez. The Second Circuit erred by failing to address Andrew's independent liberty interest in the integrity and stability of his relationship with Ms. Rodriguez.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Sylvia RODRIGUEZ, individually and on behalf of her minor child, Les Andrew Kelly, Plaintiffs-Appellees,

v.

Marjorie McLOUGHLIN, individually and as Executive Director of Cardinal McCloskey Children's and Family Services, Barbara McMurray, individually and as Foster Boarding Home Director of Cardinal McCloskey Children's and Family Services, Cardinal McCloskey Children's and Family Services, Defendants-Cross-Claimants-Appellants,

New York City Dept. of Social Services, New York City Child Welfare Administration, and The City of New York, Defendants-Cross-Defendants-Appellants.

Docket Nos. 99-7020, 99-7039, 99-7089

United States Court of Appeals,
Second Circuit.

Argued: Sept. 23, 1999

Decided: June 5, 2000

Jonathan M. Sobel, New York, New York (Howard Seife, Romy Berk, Chadbourne & Parke, New York, New York, on the brief), for Plaintiffs-Appellees.

Christopher H. Cloud, New York, New York (Kenneth J. Gomley, Capriano Lichtman & Flach, New York, New York, on the brief), for Defendants-Cross-Claimants-Appellants

Alan G. Krams, New York, New York (Jeffrey D. Friedlan der, First Assistant Corporat ion Counsel of the

City of New York, Leonard Koerner, Kristin M. Helmers, New York, New York, on the brief), for Defendants-Cross-Defendants-Appellants.

Before: WINTER, Chief Judge,

KEARSE, Circuit Judge, and MORDUE, District Judge.*

KEARSE, Circuit Judge:

Defendant Cardinal McCloskey Children's and Family Services ("McCloskey" or the "agency"), and defendants City of New York, New York City Child Welfare Administration ("CWA"), and New York City Department of Social Services (collectively "the City" or "the City defendants") appeal from a partial final judgment entered in the United States District Court for the Southern District of New York, Kimba M. Wood, *Judge*, following a jury verdict awarding plaintiff Sylvia Rodriguez, suing individually and on behalf of her adopted minor child Les Andrew Kelly ("Andrew"), a total of $40,001 in compensatory, punitive, and nominal damages against McCloskey, and a total of $10,001 in compensatory and nominal damages against the City, for due process violations found by the court in connection with the temporary removal of Andrew from Rodriguez's home when he was her foster child. Defendants Marjorie McLoughlin and Barbara McMurray, employees of McCloskey who were not parties to the trial, appeal from an order of the district court ruling that they are not entitled to qualified immunity on the claims asserted by Rodriguez.

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* Honorable Norman A. Mordue, of the United States District Court for the Northern District of New York, sitting by designation.

On appeal, all defendants contend principally that the district court erred in ruling that plaintiffs have a cognizable liberty interest. McCloskey and the individual defendants also contend, *inter alia*, that plaintiffs, even if they had such an interest, were not denied procedural due process; and the individual defendants pursue their defense of qualified immunity. For the reasons that follow, we conclude that Rodriguez and Andrew did not possess a liberty interest in their foster-parent-and-child relationship, and we therefore reverse the judgment and order of the district court and remand for dismissal of the complaint.

I. BACKGROUND

Andrew, whose father is unknown, was born on March 15, 1990, to a mother who promptly abandoned him. Thirteen days later, McCloskey, an authorized foster care agency for the City, placed Andrew in the home of Rodriguez. Rodriguez soon expressed an interest in adopting Andrew.

A. *The Planned Adoption*

Andrew had limited contact with his biological mother, and McCloskey determined that his best interests would be served by adoption. In June 1993, a family court order terminated Andrew's natural mother's parental rights and transferred legal guardianship and custody to McCloskey and the City.

In August 1993, Rodriguez and McCloskey entered into a one-page standard New York State form agreement

("Adoptive Placement Agreement" or "Agreement") in contemplation of Andrew's adoption by Rodriguez. In the agreement, Rodriguez agreed to "receive" Andrew in her home, and "[i]n so doing . . . agree[d] that":

> We will care for this child and meet the child's needs. However, the child will, where eligible, continue to receive medical, psychological, and surgical services in accordance with the medical assistance or medical subsidy programs to the extent permitted by law.
>
> We are taking this child with the intention of adoption although we understand that legal custody remains with Card. McCloskey and that this adoptive placement agreement remains in effect until the date of legal adoption.
>
> The legal adoption will take place after both Card. McCloskey and we agree that it is in the child's best interest.
>
> In the period prior to legal adoption a representative from Card. McCloskey will visit us and the child periodically and that we may call on the agency for consultation.
>
> If at any time prior to legal adoption it is determined by the agency or by us that the child should be removed from our home, we will cooperate with the agency in carrying this out in a way that serves the best interest of the child in the judgement of the agency.
>
> It is duly acknowledged by the parties hereto that the adoptive parent(s) shall have the right to intervene as an interested party in any proceeding commenced to set aside a surrender purporting to commit a guardianship or custody of a child placed in the home of the adoptive

parent(s). Such intervention shall be made anonymously or in the true name(s) of the above.

(Adoptive Placement Agreement dated August 9, 1993.)

In November 1993, a McCloskey case planner reported to CWA that McCloskey intended to finalize Andrew's adoption by Rodriguez, noting that the agency was awaiting a court date for finalization. By March 1994, most of the paperwork required for the adoption had been processed. However, a special adoption subsidy had yet to be approved, and according to the deposition testimony of the McCloskey employee who handled the adoption, the adoption application would not be submitted to the court without the subsidy approval because without it the court would not act.

B. *The Events Leading to This Action*

On March 18, 1994, McCloskey case planner Venton Monplaisir went to Rodriguez's home for a scheduled visit. Rodriguez, attending a court appointment, was not at home. Andrew, then four years old, and Thomas Green ("Thomas"), Rodriguez's other foster child, who was three years old, were at home, tended only by Rodriguez's grandson Edwin Rodriguez ("Edwin"), a twelve-year-old emotionally handicapped, special-education student. Monplaisir observed that Edwin appeared to be having difficulty managing Andrew and Thomas, and indeed appeared to be overwhelmed by them. At one point, Andrew and Thomas ran out of the apartment and down the hallway, causing Monplaisir to fear that they might tumble down the stairs. Although Rodriguez maintains that she had arranged for a neighbor to baby-sit, it

is undisputed that no adult arrived to take responsibility during the time that Monplaisir was there.

After approximately two hours, Monplaisir contacted his supervisor at McCloskey and was instructed to remove Andrew and Thomas from Rodriguez's home, which he did. Andrew and Thomas were then transferred to a new foster home. McCloskey filed a Report of Suspected Child Abuse or Maltreatment with the New York State ("State") Department of Social Services ("State DSS"), which in turn triggered an investigation by CWA's Office of Confidential Investigations ("OCI"). On the day Andrew was removed, Rodriguez telephoned McCloskey with regard to his return and was told that there would have to be an investigation. On April 1, Rodriguez requested an independent review by CWA of McCloskey's decision to remove Andrew, and a "fair hearing" before the State DSS pursuant to N.Y. Comp.Codes R. & Regs. tit. 18, § 443.5(c) (1999).

While the matter was being investigated, Rodriguez sought to visit Andrew. McCloskey denied permission pending its evaluation of whether visitation would be in Andrew's best interests while the OCI investigation was ongoing. McCloskey did not allow a visit until June 27, when Rodriguez was allowed to see Andrew for half an hour; she was allowed another visit of similar duration on July 8.

In the meantime, on April 19, 1994, OCI determined that McCloskey's view that the events of March 18 constituted child maltreatment should be rejected. It found that there was "no credible evidence to substantiate" that view, although it recommended that Rodriguez receive

training in providing proper supervision for children. OCI sent its report to McCloskey on June 20. McCloskey disagreed with OCI's determination, however, and refused to return Andrew to Rodriguez pending the outcome of the independent review by CWA.

Thereafter, CWA, in its Decision After Independent Review dated July 11, 1994 ("CWA Decision"), ordered McCloskey to return Andrew to Rodriguez. CWA stated that the March 18 removal "may be considered arguably valid" (CWA Decision at 9); but it concluded that the ensuing denial of visitation was "very questionable since neither Mrs. Rodriguez nor . . . Andrew could obviously have been prepared for their separation from each other and visiting could have helped the child's understanding of the situation" (*id.*). While endorsing OCI's recommendation that Rodriguez receive training, CWA also recommended that the adoption process be reinitiated following a 90-day period of close agency supervision.

Andrew was returned to Rodriguez on July 13, 1994. The adoption process resumed in January 1995, and Rodriguez's adoption of Andrew was finalized in August 1995.

In March 1996, Rodriguez commenced the present action under 42 U.S.C. § 1983 on behalf of herself and Andrew as her minor child, asserting due process violations. The complaint alleged that Andrew's health and safety did not warrant his summary removal from Rodriguez's home on March 18, 1994, and that McCloskey had unconstitutionally deprived Rodriguez of notice and an opportunity to be heard prior to its interference with her right as a foster and preadoptive parent and with the

liberty interests of herself and Andrew in family integrity. The complaint also alleged that McCloskey had wrongfully, arbitrarily, and capriciously denied Rodriguez a meaningful opportunity to be heard in connection with its refusal to return Andrew to her home and its denial of visitation. Plaintiffs alleged that McLoughlin, as McCloskey's executive director, and McMurray, as its foster boarding home director, had failed to correct the unconstitutional actions of the agency's employees; and that the City defendants, due to deliberate indifference reflective of a municipal custom, policy, and practice, had failed to provide adequate training for foster care agencies under their direction, including McCloskey, thereby causing the deprivations suffered by Rodriguez and Andrew.

C. *The Decisions of the District Court*

Defendants moved to dismiss the complaint on various grounds, contending principally that as foster parent and child who had not completed adoption proceedings, Rodriguez and Andrew did not have liberty interests recognized by state law. McCloskey also contended that Rodriguez had received the process to which she was due, and the individual defendants contended that they were entitled to qualified immunity.

In an Opinion and Order dated September 15, 1998, published at 49 F.Supp.2d 186-207, the district court granted in part and denied in part defendants' motions to dismiss. The court dismissed the claim that the summary removal of Andrew from Rodriguez's home on March 18,

1994, was unjustifiable. The court stated that even accepting Rodriguez's assertions as to the arrangements she had made for the care of Andrew and Thomas during her absence on that day, plaintiffs

> cannot avoid the fact that there was no adult present to supervise Ms. Rodriguez's three and four-year old children when Mr. Monplaisir arrived for a scheduled visit to the home, nor that no adult arrived to assume responsibility for the children during the time (of at least two hours) that he was present. Further, Mr. Monplaisir observed that Edwin was having difficulty keeping the children under control, and appeared to be overwhelmed by the situation. Thus, in the time before McCloskey removed the children, Ms. Rodriguez had violated New York's foster care regulations requiring that foster children under 10 years must never be left without adult supervision. *See* N.Y. Comp.Codes R. & Regs. tit. 18 § 444.5(c)(3).
>
> In the context of this case, this violation itself provides an objective basis for McCloskey's belief that leaving a three and four-year old in the care of only a twelve-year old boy posed an imminent threat to the health or safety of the children. But even without this regulatory violation, the Court would conclude that no reasonable juror could find that McCloskey lacked an objective basis to believe that Andrew and Thomas were left bereft of supervision so as to pose a sufficient threat to these children's health or safety to justify an emergency removal. As long as there is an objective basis for fear of imminent injury to the children, it is not the role of the court (either on a motion or through a jury verdict) to second-

> guess, with the benefit of hindsight, the case worker's and foster agency officials' on-the-spot determination to remove a child left without adult supervision. Accordingly, the Court grants summary judgment in favor of defendants as to plaintiff's claim that the circumstances did not justify an emergency removal, and thus dismisses plaintiff's claim that she was entitled to pre-removal notice and an opportunity to be heard.

49 F.Supp.2d at 202-03.

The court denied, however, defendants' motions to dismiss so much of the complaint as alleged denial of a reasonable postremoval hearing and denial of visitation, ruling as a matter of law that with respect to

> a New York foster mother who was in the final stages of adopting her foster child, whom she had cared for continuously since his first weeks of infancy [,] . . . there is a constitutionally protected liberty interest in the stability and integrity of the relationship between such a foster mother and foster child.

Id. at 189. The court noted that Andrew had never known his biological parents, that he had been continuously in Rodriguez's care from the first month of his life until his removal on March 18, 1994, and that Rodriguez had held the same place in Andrew's emotional life and fulfilled the same socializing functions as a biological parent or relative. *See id.* at 195. The court pointed out that New York has statutes and regulations (*see* Part II.B. below) that, *inter alia,* give foster parents who have had custody for more than 12 continuous months the right to notice of proceedings involving the child's status, *see* N.Y. Soc.

Serv. Law § 392(4)(c) (McKinney Supp.2000); give foster parents priority over others with respect to the child's adoption, *see* N.Y. Comp.Codes R. & Regs. tit. 18, § 421.13(a) (1995); and offer an adoption subsidy for foster parents attempting to adopt a child who has been in their care for more than 18 months, *see id.* § 421.24(a)(3)(iii)(f) (1996). *See* 49 F.Supp.2d at 197-98. The court concluded that "New York recognizes that such long-term foster parents have an interest in their foster children's custody status," and encourages "potential adoptive parents to become foster parents as a means to adoption." *Id.* at 198.

The district court noted that "Andrew's biological mother's parental rights had been terminated," *id.* at 199; that "neither McCloskey nor CWA had plans to return him to his biological mother or to find his biological father," *id.*; that Rodriguez was "a prospective adoptive parent who had entered into an Adoptive Placement Agreement," *id.* at 196, by which "the State (through McCloskey) expressed its interest in Andrew's adoption by Ms. Rodriguez, so long as McCloskey continued to view adoption as in Andrew's best interest," *id.*; and that the parties were "awaiting adoption finalization from the family court," *id.* at 199. The court found that Rodriguez

> cannot be said to have expected her relationship with Andrew to end. . . . [W]hile Ms. Rodriguez's expectations as to Andrew at the outset of her relationship with him were not necessarily permanent, by the time that she entered the Adoptive Placement Agreement, such intentions and expectations of permanency had formed.

Id. at 196. The court concluded that

> Rodriguez had a liberty interest within the Fourteenth Amendment's Due Process Clause in her relationship with her foster and prospective adoptive child Andrew at the time of his removal from her home on March 18, 1994. This holding recognizes such a liberty interest in only a discretely identifiable set of foster parents, (1) whose foster children's biological parents' parental rights have been terminated, (2) who have cared for their foster children continuously for more than twelve months since the child's infancy, (3) and who have entered into an adoptive placement agreement for their foster child.

Id. at 199.

Noting that "[d]ue process fundamentally requires that the aggrieved party be provided with an opportunity to be heard, ' "at a meaningful time and in a meaningful manner," ' " *id.* at 200 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965))), the district court concluded that no rational juror could find that Rodriguez was afforded a timely post-removal hearing in order to contest Andrew's removal. Pointing out that "when the state removes a child from his biological parents' custody, it must provide an opportunity to contest the removal within weeks – not months – after the removal," the court stated that although Rodriguez's interest "may be less than that of a parent who is also the legal guardian of the child," it was nonetheless strong, and there was "no basis for distinguishing the foster child's interest in a prompt hearing

from that of a biological child or an adopted child." 49 F.Supp.2d at 204. The court also saw in the foster relationship, as in the biological relationship, a similar potential for an erroneous deprivation of the parents' and child's interests in remaining together and no undue burden on the governmental entity to provide a prompt post-deprivation hearing. It concluded as follows:

> In view of Ms. Rodriguez's interest in not being erroneously separated from Andrew, the potential for such error in an emergency removal, and the fact that the state already provides an opportunity to be heard in non-emergency foster care removals, the Court finds that the delay from March 18, 1994 until June 15, 1994 in providing written notice of removal, and until June 28, 1994 in providing an opportunity to be heard to contest the removal, was not reasonably prompt, and therefore violated plaintiff's rights to due process guaranteed by the Due Process Clause of the Fourteenth Amendment.

Id. at 205.

For similar reasons, the court found that the delay in affording Rodriguez a hearing violated her rights with respect to visitation:

> Ms. Rodriguez had an interest in visiting Andrew, if only to provide him with her own explanation of the separation, attempt to reduce his sense of abandonment, and ease her own concerns about his well-being. This interest in visiting Andrew during the time that he was removed from her care derives from her underlying interest in her relationship with Andrew. In view of the Court's holding above that Ms.

> Rodriguez has a constitutionally protected liberty interest in the stability of her relationship with Andrew, the Court concludes that the deprivation of any visitation between Ms. Rodriguez and Andrew during the time of his removal also implicates a constitutionally protected liberty interest.

Id. The court stated that

> [t]he risk of erroneous deprivation is similar to that involved in the underlying removal decision (if lessened slightly because the agency may have had more time to assess the basis for the removal decision). Where, as here, the child would not be endangered by supervised visits, and visits are likely to be important in countering the child's sense of abandonment, the government's goal to further the best interest of the child is not in conflict with allowing an opportunity to contest the failure to provide visitation. Because foster care agencies have resources for facilitating supervised visitation, and because of the potential benefit to the child of having contact with the only parent he has ever known, the Court holds that the failure of defendants to provide Ms. Rodriguez any opportunity to contest the decision not to allow her to visit Andrew from March 18, 1994 until June 28, 1994 violated Ms. Rodriguez's due process rights.

Id. at 205-06.

Finally, in a ruling that, as discussed below, was later rescinded, see 49 F.Supp.2d at 207-08, the court's September 15, 1998 opinion held that the individual defendants were entitled to dismissal of the complaint against them on the ground of qualified immunity.

Having dismissed the individual defendants, and having held as a matter of law that the failure to afford Rodriguez a timely postremoval hearing and the denial of visitation constituted due process violations, the court ordered a jury trial of those claims against McCloskey and the City on the issue of damages. At trial, the jury was instructed that the court had already determined that the decision to remove Andrew on March 18, 1994, was reasonable and lawful, but that the subsequent delay in providing Rodriguez with notice and an opportunity to be heard to contest the removal, and the denial of Rodriguez's request to visit Andrew for some three months, were unconstitutional. The jury was instructed that its task was to decide whether and to what extent Rodriguez and/or Andrew had suffered injury by reason of the delay and the denial of visitation.

The jury found that Rodriguez had suffered compensable injury, though Andrew had not. Against McCloskey, the jury awarded Rodriguez, in her own right, $20,000 in compensatory damages plus $10,000 in punitive damages, and awarded her on behalf of Andrew $1 in nominal damages plus $10,000 in punitive damages. Against the City, the jury awarded Rodriguez $10,000 in compensatory damages in her own right, and $1 in nominal damages on behalf of Andrew. Judgment was entered accordingly on December 28, 1998.

Following the trial, the district court revisited its pretrial decision dismissing the claims against the individual defendants on the ground of qualified immunity. In light of the Supreme Court's ruling in *Richardson v. McKnight*, 521 U.S. 399, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997) (prison guards employed by private for-profit

management companies not entitled to qualified immunity in actions brought under § 1983), the district court concluded, in a January 8, 1999 Amended Opinion and Order, that qualified immunity was unavailable to the individual McCloskey employee defendants as a matter of law. See 49 F.Supp.2d at 207-08. The court accordingly vacated the September 15, 1998 Opinion's grant of summary judgment in favor of the individual defendants and ordered a trial against those defendants with respect to their individual responsibility for the denials of a post-removal hearing and visitation.

The individual defendants promptly appealed the amended interlocutory order denying them qualified immunity, *see generally X-Men Security, Inc. v. Pataki*, 196 F.3d 56, 65 (2d Cir.1999) (a ruling as a matter of law rejecting a claim of qualified immunity is immediately appealable). Pursuant to Fed.R.Civ.P. 54(b), the district court certified the December 28, 1998 judgment, which reflected the jury's awards against the institutional defendants and the district court's holdings as to the existence and violations of plaintiffs' liberty interests, as a partial final judgment. McCloskey and the City have appealed that judgment.

II. DISCUSSION

On these appeals, all defendants contend that the district court erred in ruling that, when Andrew was removed from Rodriguez's home, plaintiffs had cognizable liberty interests in living together and in postremoval visitation. In addition, McCloskey, McLoughlin, and

McMurray contend that even if plaintiffs had constitutionally protected liberty interests, there was no lack of due process, and that in any event, McLoughlin and McMurray are entitled to qualified immunity. The City concedes that if a liberty interest existed, plaintiffs did not receive procedural due process. For the reasons that follow, we conclude that at the time of Andrew's removal, plaintiffs did not have cognizable liberty interests. In light of that conclusion, we need not reach the parties' other contentions.

A. *Due Process Principles*

A liberty interest may arise from either of " 'two sources – the Due Process Clause itself [or] the laws of the States.' " *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989) (quoting *Hewitt v. Helms*, 459 U.S. 460, 466, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983)). Among the liberty interests that may arise under the Due Process Clause itself is " 'freedom of personal choice in matters of . . . family life.' " *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 842, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977) ("*OFFER*") (quoting *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974)). "[T]he usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." *OFFER*, 431 U.S. at 843, 97 S.Ct. 2094.

Biological relationships obviously "are not [the] exclusive determination of the existence of a family"; the marriage relationship, which is the "basic foundation of

the family in our society, is of course not a matter of blood relation," though it entails rights of privacy " 'older than the Bill of Rights.' " *Id.* (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)). "[T]he liberty interest in family privacy," whether biological or marital, "has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in this Nation's history and tradition." *OFFER*, 431 U.S. at 845, 97 S.Ct. 2094 (footnote and internal quotation marks omitted).

A foster family, whose relationships ordinarily are not based on blood or marriage, *but see Rivera v. Marcus*, 696 F.2d 1016 (2d Cir.1982) (recognizing protectable liberty interest of foster parent who was related biologically to her foster children), "has its source in state law and contractual arrangements." *OFFER*, 431 U.S. at 845, 97 S.Ct. 2094. This does not mean that the emotional bonds formed in a foster family may not be just as strong as those formed by blood or marriage. As the *OFFER* Court noted,

> [n]o one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.

Id. at 844, 97 S.Ct. 2094 (footnote omitted). "[H]owever, whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset," *id.* at 845, 97 S.Ct. 2094, and

> where, as here, the claimed interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties,

id. at 845-46, 97 S.Ct. 2094.

Although the *OFFER* Court ultimately chose not to resolve the question of the existence of a liberty interest, given the Court's holding that the plaintiffs before it had received adequate process, *see* 431 U.S. at 847, 97 S.Ct. 2094, the reasoning quoted above leads us to the conclusion that any liberty interest arising in the preservation of a biologically unrelated foster family would arise, if at all, only under state law and not under the Due Process Clause itself. Accordingly, we turn to the question of whether plaintiffs had a liberty interest created by New York law.

Mere expectations do not necessarily give rise to a state-created liberty interest protected by the Due Process Clause. "[A] State creates a protected liberty interest by placing substantive limitations on official discretion." *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 462 (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983)). "[T]he most common manner in which a State creates a liberty interest is by establishing 'substantive predicates' to govern official

decisionmaking . . . and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 462, 109 S.Ct. 1904 (quoting *Hewitt v. Helms*, 459 U.S. at 472, 103 S.Ct. 864 ("specified substantive predicates")). To create a liberty interest, a statute or regulation must "contain 'explicitly mandatory language,' *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 463, 109 S.Ct. 1904 (quoting *Hewitt v. Helms*, 459 U.S. at 472, 103 S.Ct. 864).

We note that *Kentucky Department of Corrections v. Thompson*, *Olim v. Wakinekona*, and *Hewitt v. Helms* all arose in a prison context, and that the Supreme Court in *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), somewhat altered the analysis applicable to claims by prisoners by ruling that the mere presence of mandatory language does not necessarily mean that a liberty interest has been created, *see* 515 U.S. at 483-84, 115 S.Ct. 2293. That is, after *Sandin*, a prisoner is not necessarily protected by the Due Process Clause even if the pertinent prescribed substantive predicate for the action taken was in fact absent. We do not regard *Sandin* as overruling the principle for which we cite the *Thompson* line of cases, however. First, the *Sandin* Court's modification of the *Thompson* analysis appears to be limited to the prison regulation context; the *Sandin* Court stated that the conclusion that a plaintiff has a right to due process protection where the language is mandatory and the substantive predicates are absent "may be entirely sensible in the ordinary task of construing a

statute defining rights and remedies available to the general public," *id.* at 481, 115 S.Ct. 2293. More importantly, *Sandin* does not disturb the *Thompson* principle that no liberty interest has been created by state law where there is no mandatory language. *See, e.g., id.* at 483 n. 5, 115 S.Ct. 2293 (noting that *Sandin* ruling did not technically overrule *Thompson*, because the *Thompson* Court had concluded that the lack of mandatory language in the case before it meant that no liberty interest had been created). This Court has applied that principle outside of the prisoner-rights context, *see Silano v. Sag Harbor Union Free School District Board of Education*, 42 F.3d 719, 724-25 (2d Cir.1994) (school board member not deprived of liberty interest by being barred from school grounds), *cert. denied*, 515 U.S. 1160, 115 S.Ct. 2612, 132 L.Ed.2d 856 (1995), and we conclude that the principle remains viable and is applicable here.

Further, the search for specific substantive directives to the decisionmaker is context-specific.

> It should be obvious that the mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found. The search is for *relevant* mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether [the plaintiff] may be deprived of the particular interest in question.

Kentucky Department of Corrections v. Thompson, 490 U.S. at 464 n. 4, 109 S.Ct. 1904 (emphases in original). Thus, a mandate constraining the decisions of officials on one set of facts, and thereby establishing one liberty interest,

does not create a liberty interest in different circumstances.

Finally, the fact that a state has established procedures to be followed does not mean that it has created a protectable liberty interest.

> Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement. . . . The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.

Olim v. Wakinekona, 461 U.S. at 250-51, 103 S.Ct. 1741 (footnote omitted). Thus, a statute that merely establishes procedural requirements does not thereby create a liberty interest, because an " 'expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause.' " *BAM Historic District Association v. Koch*, 723 F.2d 233, 237 (2d Cir.1983) (quoting *Olim v. Wakinekona*, 461 U.S. at 250 n. 12, 103 S.Ct. 1741); *see also Cofone v. Manson*, 594 F.2d 934, 938 (2d Cir.1979).

B. *New York State Law*

In ruling that Rodriguez and Andrew possessed a constitutionally protected liberty interest in their foster-family relationship, the district court relied on eight statutory and regulatory provisions of New York law, which provide as follows:

> (1) "Foster parents having had continuous care of a child, for more than twelve months,

through an authorized agency, shall be permitted as a matter of right, as an interested party to intervene in any proceeding involving the custody of the child." N.Y. Soc. Serv. Law § 383(3) (McKinney 1992).

(2) When the family court accepts the surrender of a child for adoption, "the court shall inquire whether any foster parent or parents with whom the child resides, or any relative of the child, or other person, seeks to adopt such child. If such person or persons do seek to adopt such child, such person or persons may submit, and the court shall accept, all such petitions for the adoption of the child, together with an adoption home study. . . . The court shall thereafter establish a schedule for completion of other inquiries and investigations necessary to complete review of the adoption of the child and shall immediately set a schedule for completion of the adoption." *Id.* § 383-c(10) (McKinney 1992).

(3) An authorized agency "must . . . inform foster parents that a child in their care who is free or to be freed for adoption and inform foster parents who have not completed an application to become adoptive parents of the procedure for applying to adopt the child." N.Y. Comp.Codes R. & Regs. tit. 18, § 421.19(a)(1) (1999).

(4) "Any adult husband and his adult wife and any adult unmarried person, who, as foster parent or parents, have cared for a child continuously for a period of twelve months or more, may apply to such authorized agency for the placement of said child with them for the purpose of adoption, and if said child is eligible for

adoption, the agency shall give preference and first consideration to their application over all other applications for adoptive placements." N.Y. Soc. Serv. Law § 383(3).

(5) In authorized agencies' evaluation of adoption applicants, "foster parents seeking to adopt a child who has resided in their home 12 continuous months . . . shall receive first priority for adoption studies." N.Y. Comp.Codes R. & Regs. tit. 18, § 421.13(a)(1).

(6) "In any agreement between an authorized agency and foster parents with whom a child or children are to be placed or boarded, there shall be contained therein the following language: 'It is duly acknowledged by the parties hereto that pursuant to the law of the state of New York, a foster parent shall have preference in any proceedings to adopt the child subject to this agreement upon such child having been in the custody of such foster parent for a period in excess of twelve months.' " N.Y. Soc. Serv. Law § 374(1-a)(McKinney 1992).

(7) Foster parents "in whose home the child resided or resides at or after the expiration of a continuous period of twelve months in foster care" shall receive notice of a hearing to review the foster care status of a child who has been freed for adoption, among other events. *Id.* § 392(4)(c).

(8) An adoption subsidy is available for "hard to place children." Among several other grounds, "the child is hard to place with parent(s) other than his/her present foster parent(s) because he/she has been in care with the same foster parent(s) for 18 months or more prior to

> the signing of the adoption placement agreement by such foster parent(s) and has developed a strong attachment to his/her foster parent(s) while in such care and separation from the foster parent(s) would adversely affect the child's development." N.Y. Comp.Codes R. & Regs. tit. 18, § 421.24(a)(3)(iii)(f).

We see in these sections no language providing substantive predicates for, or substantive limitations on, the exercise of official discretion with respect to matters of removal or visitation. The provisions designated (1), (2), (3), and (7) confer on foster parents certain procedural rights – the rights to intervene in a custody proceeding, to petition for adoption, and to receive notice that a child in their care has been made available for adoption or freed for adoption. But, under the principles discussed above, the establishment of these merely procedural requirements – even if they purported to govern visitation matters, which they do not, or to govern removal unrelated to possible adoption proceedings, which at least provisions (2), (3), and (7) do not – do not suffice to create the liberty interests asserted by plaintiffs. Provisions (4), (5), and (6) give foster parents a "preference" or "priority" over another applicant seeking to adopt a child if the child has been in the foster parents' custody for at least 12 months. While these provisions doubtless encourage foster parents to adopt their foster children, they do not purport to deal with, much less create substantive rights with respect to, a foster child's removal, return, or visitation. "[T]he preference of Social Services Law § 383(3) in adoption applications is substantially unrelated to determinations concerning the removal of foster children from foster homes, which remains in the broad

discretion of the custodial agency." *Ferri v. County of Broome*, 154 A.D.2d 771, 772, 546 N.Y.S.2d 223, 224 (3d Dep't 1989).

Finally, provision (8), which affords an adoption subsidy for children who are "hard to place," undeniably gives an incentive for potential adoptive parents to become foster parents as a means to adoption, and thereby helps to implement New York's policy favoring foster parenting as a precursor to adoption. But, despite its reference to a "separation from the foster parent(s)," it imposes no relevant substantive limitations on official discretion with respect to matters of removal and visitation. We cannot conclude that § 421.24(a)(3)(iii)(f) gives a subsidy recipient the liberty interests claimed by Rodriguez.

Plaintiffs also cite a State regulation that provides that "[e]fforts to remove a child from the care and custody of his biological parent, adoptive parent, or legal guardian shall be undertaken only when it is clearly established that such action is in such child's best interest." N.Y. Comp.Codes R. & Regs. tit. 18, § 421.2(b) (1999). Although Rodriguez falls within the regulations' definition of "adoptive parent," *see id.* § 421.1(c) (1999) (including within that definition "a person with whom a child has been placed for adoption"), she cannot avail herself of § 421.2(b) because, as the Adoptive Placement Agreement makes clear, Andrew was not in Rodriguez's custody. Custody remained with McCloskey, and thus the regulation governing removals of a child from a parent or guardian's "care and custody" was inapplicable to Rodriguez.

In sum, none of the statutory or regulatory sections called to our attention contains any substantive predicates or explicitly mandatory language giving directives to decisionmakers as to the cohabitation or visitation rights of a foster mother and child in the wake of an emergency removal of the child from the foster home. We cannot conclude that these provisions are sufficient to give plaintiffs the liberty interests they assert.

C. *The Adoptive Placement Agreement*

Finally, we are unpersuaded that a protectable liberty interest was created by the fact that Rodriguez and McCloskey had entered into the Adoptive Placement Agreement. Though the district court found that that Agreement created in Rodriguez expectations of permanence, the terms of the Agreement made clear that adoption was not a foregone conclusion and that the agency retained both custody of Andrew and discretion to determine whether his best interest would be served by effectuating the adoption or by removal from the foster home. The Adoptive Placement Agreement provided, *inter alia*,

> – that Rodriguez "underst[oo]d that legal custody remains with Card. McCloskey";
>
> – that the Agreement was to "remain in effect until the date of legal adoption";
>
> – that "legal adoption will take place after both Card. McCloskey and [Rodriguez] agree that it is in the child's best interest";
>
> and
>
> – that if at any time prior to the legal adoption "it is determined by the agency or" by

> Rodriguez that the child should be removed from the foster home, Rodriguez would cooperate with the agency in carrying this out in a way that serves the best interest of the child "in the judgement of the agency."

Thus, the Agreement was explicit that the agency, not Rodriguez, was Andrew's legal custodian and would remain so until the adoption was finalized. We see no contractual provisions placing substantive limitations on the agency's judgment as to whether adoption or removal would be in the best interest of the child. We cannot conclude that the State's standard form Adoptive Placement Agreement so augmented the statutory and regulatory provisions as to give plaintiffs a liberty interest in the foster relationship prior to the adoption's finalization.

The City, on this appeal, "acknowledges that" if plaintiffs had a constitutionally protected liberty interest, "the hearing plaintiff received here was too long after the emergency removal to satisfy procedural due process standards." (City brief on appeal at 36.) And its Child Welfare Agency, expressing fitting concern for the emotional well-being of a four-year-old child removed from the foster care of the only parent he had ever known, called McCloskey's postremoval denial of visitation "very questionable since neither Mrs. Rodriguez nor . . . Andrew could obviously have been prepared for their separation from each other and visiting could have helped the child's understanding of the situation." (CWA Decision at 9.) Ensuring appropriate treatment by the private agencies that the City chooses to authorize to administer foster care remains a matter for supervision by state and local legislative and administrative bodies. It

is to be hoped that those authorities will take appropriate steps to prevent the recurrence of judgmental errors such as this.

CONCLUSION

We have considered all of plaintiffs' arguments on this appeal and have found in them no basis to conclude that plaintiffs have shown a liberty interest protected by the Due Process Clause. The judgment is reversed and the matter is remanded for dismissal of the complaint.

No costs.

Sylvia RODRIGUEZ, individually and on behalf of her minor child, Les Andrew Kelly, Plaintiffs,

v.

Marjorie McLOUGHLIN, individually and as Executive Director of Cardinal McCloskey Children's and Family Services, Barbara McMurray, individually and as Foster Boarding Home Director of Cardinal McCloskey Children's and Family Services, Cardinal McCloskey Children's and Family Services, New York City Department of Social Services, New York City Child Welfare Administration, and the City of New York, Defendants.

No. 96 Civ.1986(KMW).

United States District Court,
S.D. New York.

Jan. 8, 1999.

Howard Seife, Elyse C. Pepper, Winston & Strawn, New York, NY, for Plaintiff.

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Frances Sands, Paul A. Crotty, Corporation Counsel of the City of New York, New York, NY, for Defendants New York Dept. of Social Services, New York City Child Welfare Admin., City of New York.

AMENDED OPINION and ORDER

KIMBA M. WOOD, District Judge.

This action arises out of Cardinal McCloskey Children's and Family Services's ("McCloskey") removal of a former foster child, Les Andrew Kelly ("Andrew"), on an alleged emergency basis from the home of his former foster, now adoptive, mother, Sylvia Rodriguez, on March 18, 1994. Sylvia Rodriguez, individually and on behalf of her son Andrew, alleges under 42 U.S.C. § 1983 that the removal of Andrew violated their right to procedural due process guaranteed by the Due Process Clause of the Fourteenth Amendment because (1) the circumstances of Ms. Rodriguez's foster children, Andrew and his foster brother Thomas Green, on March 18, 1994 did not justify an emergency removal, and therefore she was entitled to notice and an opportunity to be heard prior to their removal, (2) Ms. Rodriguez was not provided with either adequate post-removal notice or opportunity to be heard to contest the removal, and (3) Ms. Rodriguez was not provided an adequate opportunity to be heard to contest the denial of her request to visit Andrew. Defendants move to dismiss the complaint with prejudice, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Defendants' motion presents the Court with a series of novel and difficult questions concerning the scope and character of the procedural protections of the Due Process Clause of the Fourteenth Amendment in the context of an alleged emergency removal of a child from a New York foster mother who was in the final stages of adopting her foster child, whom she had cared for continuously since his first weeks of infancy. As explained in the discussion

below, the Court holds that there is a constitutionally protected liberty interest in the stability and integrity of the relationship between such a foster mother and foster child. Further, the Court also holds that the delay in providing Ms. Rodriguez with notice and an opportunity to be heard to contest (1) the removal and (2) the denial of Ms. Rodriguez's request to visit Andrew for approximately three months following the removal violated the Due Process Clause's fundamental requirement that an aggrieved party be provided with an opportunity to be heard " 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)); *see Brock v. Roadway Express*, 481 U.S. 252, 261, 107 S.Ct. 1740, 95 L.Ed.2d 239 (1987) (quoting same). However, the Court grants defendants' motion, which it treats as a motion for summary judgment, as to plaintiff's claims that there was no basis for emergency removal.

Finally, the Court hereby vacates its earlier Order of September 15, 1998 in this case solely as to its decision to grant the individual defendants qualified immunity.

I. *Background*

To address Ms. Rodriguez's constitutional claims, it is necessary to understand the circumstances of Ms. Rodriguez's foster care relationship with Andrew from its inception through Andrew's return to Ms. Rodriguez's care subsequent to his removal on March 18, 1994. Except as otherwise noted, the Court finds there is no genuine issue as to these facts.

Andrew was born on March 15, 1990; his biological mother abandoned him immediately following his birth. Thirteen days after his birth, McCloskey, the authorized foster care agency for the City of New York, placed Andrew in the certified foster home of Ms. Rodriguez pursuant to a foster family agreement between McCloskey and Ms. Rodriguez. Andrew lived continuously with Ms. Rodriguez for his first four years until McCloskey removed Andrew from Ms. Rodriguez's residence on March 18, 1994.

Prior to Andrew's removal, McCloskey caseworkers and administrators viewed Ms. Rodriguez as an affectionate and caring foster parent who consistently provided for Andrew's basic needs. Venton Monplaisir, the McCloskey caseworker responsible for Andrew's case through March 18, 1994, observed that a strong bond had formed between Ms. Rodriguez and Andrew, that Ms. Rodriguez ably provided for his needs, and that Andrew called Ms. Rodriguez "Mommy" and depended on her as such. McCloskey case worker notes reveal that Andrew had limited contact with his biological mother, meeting her only a few times in his first three years. By January 21, 1992, McCloskey had determined that it would not be in Andrew's best interest to return to his biological mother, and that the permanent goal for Andrew was adoption. By that time, McCloskey considered Ms. Rodriguez as a possible adoptive parent for Andrew. Mr. Monplaisir believed that adoption by Ms. Rodriguez was a good option for Andrew. In McCloskey's October 26, 1993 Annual Recertification Study for Ms. Rodriguez, McCloskey noted that there was "very little chance of abuse or neglect; foster mother knows the dangers and

will not subject the children consciously." (Pl. Exh. 29 at CM 01225.) The report also noted that Ms. Rodriguez "has available resources of neighbors and family members, however, she must be willing to trust people and be more positive," and "recommend[ed] that she test her neighbors so that she could use them to baby sit more often." (*Id.* at CM 01228.)

A family court order dated June 25, 1993 terminated Andrew's biological mother's parental rights; legal custody over Andrew was then transferred to McCloskey. On August 9, 1993, Ms. Rodriguez and McCloskey entered into an Adoptive Placement Agreement. In November 1993, McCloskey reported to the New York Child Welfare Administration ("CWA"), that its new goal for Andrew was to finalize Ms. Rodriguez's adoption. All the paperwork involved in Ms. Rodriguez's adoption application was filed before the March 18, 1994 removal from her home; McCloskey reported to CWA that at the time of his removal, McCloskey was awaiting the conclusion of the adoption finalization process.

On March 18, 1994, Ms. Rodriguez was the foster mother not only for Andrew, but also for Thomas Green, who was then three years old. Ms. Rodriguez's grandson, Edwin Rodriguez, was also living with her. Edwin was twelve years old on March 18, 1994 and a student in special education at P.S. 75 in Queens. On March 18, 1994, when Mr. Monplaisir arrived at Ms. Rodriquez's home for a scheduled visit, he found only Edwin supervising Andrew and Thomas. Mr. Monplaisir, the only direct witness to the state in which he found Edwin, Andrew, and Thomas testified at deposition:

I believe Les Andrew Kelly answered the door. Thomas Green, Andrew Kelly and Edwin, who is alleged to be her grandson, was at home. Ms. Rodriguez was not in that house. . . . I did have a concern, and I questioned [Edwin] on why he wasn't in school that day. And I was there for some time, and my question was who are you here with or who's supervising the kids. He appeared to be having some difficulty managing the two kids there on his own, and he had said something about someone next door or someone across the hall looking after them or something, but they weren't in the home the entire time that I was there.

So I did go over to the neighbor's apartment and questioned them in terms of if they were, indeed, babysitting or watching after the kids . . . one person told me something about well, they can always knock on my door if it's an emergency . . . [E]ven after I questioned them, no one took the initiative to come over to the apartment, because that was the question at hand[.][B]ut then there was another individual, a young lady in that home who seemed at to be pretty concerned that questioned me if Ms. Rodriguez would get in trouble for the kids being left alone. But then still no one . . . no one took the responsibility of coming back over to the apartment to stay with the children. So, as a result, I ended up staying at the apartment.

Then Ms. Rodriguez's daughter came by while I was there. So I kind of figured well, I'd ask her maybe she's going to supervise the children there, but she wasn't concerned about staying there. She was just coming to get something

> and to get out. She had some appointment somewhere else.
>
> And then once again, the kids are running all over the place, and I could see that Edwin was having [a] difficult time managing them, during the time I was there. I mean I noticed he did try to . . . put something together for them to eat. And I felt he was in a really bad situation because I felt a little overwhelmed, and then at one point I believe when I was walking around the apartment, both Andrew Kelly and Thomas Green ran out in the hallway, making – yelling, laughing, whatever. When I finally notice they weren't in the apartment, when I ran out in the hallway, they were right at the top of the stairs, which are some pretty steep steps of stone, and I got really worried and concerned about that, and I then ran outside and had them come back in the apartment. . . .
>
> I know I was there for at least two hours. . . . I then contacted the agency and spoke to the administrator.

(Def. Exh. N. at 198-202.) Mr. Monplaisir left Ms. Rodriguez's apartment to contact his supervisor. Before he left to contact his supervisor, Mr. Monplaisir also observed Edwin trying to clean the children, but he did not recall whether he was bathing them, or merely washing their faces. (*Id.* at 203.) Mr. Monplaisir testified that Edwin "was having a very difficult time . . . he appeared to me to be very overwhelmed and very worried and concerned that I was then there without his grandmother, but he appeared to me to be very overwhelmed." (*Id.* 204-05.) Because Mr. Monplaisir's supervisor was not available, he spoke with Barbara McMurray, director of

McCloskey's foster boarding home, who in turn contacted his supervisor. Ms. McMurray instructed Mr. Monplaisir to return to Ms. Rodriguez's apartment and stay with the children. After returning to Ms. Rodriguez's apartment, Mr. Monplaisir was instructed by his supervisor to remove Andrew and Thomas from Ms. Rodriguez's home, which he did.[1]

On the morning of March 18, 1994, Ms. Rodriguez was away from her home because she had a scheduled court appointment regarding the custody of Edwin. Ms. Rodriguez alleges that on that morning she had arranged for her neighbor, Myra Aponte, to baby-sit Andrew and Thomas while she was in court. Ms. Rodriguez maintains before leaving her apartment building on the morning of March 18, 1994, she informed another neighbor, Harriet Bentley, that Ms. Aponte had taken her own children to school, and would return within 10-15 minutes to care for Andrew and Thomas. Ms. Rodriguez also asserts that Ms. Bentley did check in on Ms. Rodriguez's apartment while Mr. Monplaisir was with the children, to make herself available to them in event of an emergency, which she told Mr. Monplaisir. Ms. Rodriguez's position is that she left Andrew and Thomas in the care of Edwin because she expected Ms. Aponte to return to the children momentarily. Ms. Rodriguez contends that Edwin was capable of

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[1] In the fall of 1993, two anonymous complaints were filed concerning Ms. Rodriguez's care for her foster children; in December 1993 the Office of Confidential Investigations of CWA determined that these complaints were unfounded. McCloskey was aware of this determination, and according to Ms. McMurray, these complaints were not a factor in McCloskey's decision to remove Andrew and Thomas.

feeding, bathing, and taking care of Andrew and Thomas. Ms. Rodriguez claims that Edwin's status as a student in special education does not adequately convey his capacities taking care of Andrew and Thomas. Ms. Rodriguez also points out that two of her neighbors were baby-sitters certified by McCloskey. Defendants dispute Ms. Rodriguez's depiction of the arrangements that she had in place on the morning of March 18, 1994 and Edwin's ability to care for Andrew and Thomas.

McCloskey made arrangements for Andrew's and Thomas's transfer to another foster home contemporaneously with their removal. On March 18, 1994, McCloskey did not provide Ms. Rodriguez with written notice of Andrew's removal, as it would have if the removal had been planned. When Ms. Rodriguez telephoned McCloskey upon her return from court to find out what had happened, she received notice that McCloskey had removed Andrew and Thomas. On or about the day of Andrew's removal, McCloskey submitted a Report of Suspected Child Abuse or Maltreatment to the New York State Central Registry. Thereafter, CWA's Office of Confidential Investigations ("OCI") commenced an investigation into the circumstances surrounding Andrew's removal.

In a letter dated March 31, 1994, a staff attorney from Bronx Legal Services, Nanette Schorr, wrote to McCloskey on Ms. Rodriguez's behalf requesting that visitation be set up immediately. On April 6, 1994, McCloskey responded that OCI had not completed its investigation, and that while the OCI investigation is pending, McCloskey was evaluating whether visitation would be in the best interest of the child. Ms. Rodriguez

subsequently applied for an Independent Review and a Fair Hearing concerning the removal of Andrew. McCloskey believed that its charges of neglect against Ms. Rodriguez would be confirmed by the OCI investigation. In a handwritten Report dated April 19, 1994, OCI determined that there was no credible evidence to support the charges of neglect against Ms. Rodriguez, and concluded that the Report of Suspected Child Abuse or Maltreatment was unfounded. The OCI report directed training for Ms. Rodriguez in the area of the proper supervision of foster children. OCI sent a copy of its Report to McCloskey on June 20, 1994. The parties dispute whether McCloskey had information about OCI's conclusion as early as May 27, 1994. (*See* Pl. 56.1 ¶¶ 105-07; Def. Resp. 56.1 ¶¶ 105-07.)

Before OCI sent a copy of its report to McCloskey, Dr. Lawrence Fantl, McCloskey's in-house psychologist, conducted an examination of Andrew, on June 13, 1994, to evaluate Andrew's adjustment to his new foster home and to assist McCloskey in determining what was in Andrew's best interest. Dr. Fantl concluded, among other things, that Andrew was adjusting well to his new foster home. On June 15, 1994, a scheduled Fair Hearing was adjourned until July 13, 1994 because the Administrative Law Judge determined that an Independent Review should be conducted first. On June 15, 1994, McCloskey sent Ms. Rodriguez written notice of removal of Andrew from her home. On June 15, 1994, Ms. Rodriguez's attorney again requested that Ms. Rodriguez be allowed to visit Andrew.

Ms. Rodriguez was permitted to visit Andrew for the first time on June 27, 1994. An Independent Review Hearing was conducted on June 28, 1994. On July 8, 1994, a second visit between Ms. Rodriguez and Andrew took place. McCloskey reported to CWA that these two visits "were closely supervised by the social worker and the child appeared to be very attached to Ms. Rodriguez, [who] was also very affectionate with the child. . . . " On July 11, 1994, CWA rendered its decision on Independent Review and ordered McCloskey to return Andrew to Ms. Rodriquez's care. In its decision, CWA noted that McCloskey's decision not to allow "visiting during the OCI investigation . . . seemed curious since the child would not have been endangered by the visits per se," and that this decision was questionable in view of the fact that "visiting could have helped the child's understanding of the situation." (Pl. Exh. 35 at CM 01755.) The Independent Review further concluded that following a ninety day period of close supervision, "the adoption process should be reinitiated." (*Id.*) On July 12, 1994, Ms. Rodriguez's counsel withdrew her request for a Fair Hearing in view of the fact that Ms. Rodriguez had succeeded at Independent Review in restoring Andrew to Ms. Rodriguez's care.

Andrew's adoption process resumed January 4, 1995. Ms. Rodriguez's adoption of Andrew was finalized on August 17, 1995.

II. *Discussion*

A. *The Standard*

Rule 12(b) of the Federal Rules of Civil Procedure provides that if matters outside the pleadings are presented to the Court, and the Court does not exclude that evidence, the motion shall be treated as one for summary judgment and "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." In this case, there has been extensive discovery, and prior to permitting defendants' motion, the parties exchanged extensive Local Civil Rule 56.1 Statements. These Statements assert, in detail, the facts each party views as material to defendants' motion, and append portions of the documentary record to support each statement. The Court then held a conference to review these statements and evaluate the utility of a summary judgment motion. Thus, both parties have had an opportunity to present pertinent facts raised by defendants' motion, and the Court treats defendants' motion as a motion for summary judgment under Rule 56. *See Groden v. Random House, Inc.*, 61 F.3d 1045, 1052-53 (2d Cir.1995) (essential inquiry is whether non-movant should reasonably have recognized possibility that motion might be treated as one for summary judgment or was taken by surprise and deprived of reasonable opportunity to meet facts outside the pleadings).

On a motion for summary judgment, a court "cannot try issues of fact; it can only determine whether there are issues to be tried." *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 58 (2d Cir.1987) (citations and internal quotation marks omitted). To prevail on a motion for

summary judgment, the moving party therefore must show that there are no such genuine issues of material fact to be tried, and that he or she is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Citizens Bank v. Hunt*, 927 F.2d 707, 710 (2d Cir.1991). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion," which includes identifying the materials in the record that "it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. 2548. Once a motion for summary judgment is made and supported, the non-moving party must set forth specific facts that show that there is a genuine issue to be tried. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Although a court considering a motion for summary judgment must view all evidence in the light most favorable to the non-moving party, and must draw all reasonable inferences in that party's favor, *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 572 (2d Cir.1993), the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). If, based on the submissions to the court, no rational fact-finder could find in the non-movant's favor, there is no genuine issue of material fact, and summary judgment is appropriate. *See Anderson*, 477 U.S. at 250, 106 S.Ct. 2505.

Title 42, United States Code § 1983 provides a federal cause of action for "deprivations of any rights, privileges, or immunities secured by the Constitution and laws." To

state a claim upon which relief may be granted under § 1983, the plaintiff must allege "(1) that the challenged conduct was attributable at least in part to a person acting under color of state law, and (2) that such conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States." *Eagleston v. Guido*, 41 F.3d 865, 876 (2d Cir.1994) (quoting *Dwares v. City of New York*, 985 F.2d 94, 98 (2d Cir.1993)).

Defendants move for summary judgment on several grounds which, if accepted, would entitle them to judgment. First, defendants argue that plaintiff does not have a "liberty" interest that falls within the Fourteenth Amendment's protection. Second, defendants contend that even assuming that plaintiff has a liberty interest under the Due Process Clause, plaintiff received all the process that was constitutionally due to her. Third, defendants argue that an Article 78 proceeding under the New York Civil Practice and Rules is plaintiff's exclusive remedy. The individual defendants also argue that plaintiff's claims against them should be dismissed under the doctrine of qualified immunity.

B. *Procedural Due Process*

Plaintiff asserts only a procedural due process claim. An individual "is not entitled to constitutional protection under the Due Process Clause unless that party can demonstrate that: (a) there has been a deprivation of liberty or property in a constitutional sense; and (b) the procedures used by the state to effect this deprivation were constitutionally inadequate." *Rivera v. Marcus*, 696 F.2d 1016, 1022 (2d Cir.1982) (citing *Smith v. Organization of Foster Families*

for Equality and Reform ("*OFFER*"), 431 U.S. 816, 847, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977)), *see Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Plaintiff asserts that she was deprived of liberty, not property, protected by the Due Process Clause. Thus, the threshold determination that the Court must make is whether plaintiff was deprived of a liberty interest protected by the Due Process Clause.

1. *Liberty Interest in Pre-Adoptive Foster Care Relationship*

Plaintiff asserts that she has a constitutionally protected liberty interest in the integrity and stability of her pre-adoptive foster care relationship. Specifically, plaintiff argues that there is a constitutionally protected liberty interest in the continuity of a foster care relationship where, as here, the foster parent has cared for the foster child for several years continuously from the child's infancy, the foster child had not known any other parent, the biological parents' parental rights over the child were terminated, and the foster parent had applied to adopt the foster child.

The Supreme Court has affirmed that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights [the Supreme] Court has ranked as 'of basic importance in our society,' . . . rights sheltered by the Fourteenth Amendment against the State's unwanted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S.Ct. 555, 564, 136 L.Ed.2d 473 (1996) (internal citation omitted); *see Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632,

639-40, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."). The diversity of family constellations in our society have forced the courts to make determinations about what types of familial relationships involve liberty interests protected by the Fourteenth Amendment. Procedural due process protection embraces the parent-child relationship, whether biological or formalized through adoption. *See Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (biological father who raised his children entitled to due process protection regarding his fitness as parent); *Rivera*, 696 F.2d at 1022 (citing cases). It is now well established that extended families fall within the scope of due process protection. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 504, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (Powell, J., plurality opinion) (noting that minors' relationships with uncles, aunts, cousins, and grandparents merit constitutional protection).

The instant case presents difficult issues of whether due process protection extends to a parent-child relationship that has its origin in state law and contract, but in which emotional and psychological ties hoped for in biological families, as well as an expectation of permanency, have developed. The starting point for addressing these issues is the Supreme Court's decision in *OFFER*. In *OFFER*, a class of long-term foster parents and an organization of foster parents alleged under § 1983 that New York State procedures governing the removal of foster children from foster homes violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Plaintiffs in *OFFER* argued that when a child has lived in a foster home for twelve months or more, the foster parent and child develop psychological and other familial ties; they urged the Supreme Court to recognize that such foster parents have a liberty interest in the survival of the foster family sufficient to merit the protections of the Due Process Clause of the Fourteenth Amendment. *See OFFER*, 431 U.S. at 839, 97 S.Ct. 2094. The Court discussed whether a foster family has such a constitutionally protected liberty interest, but found it unnecessary to resolve that question because, even assuming such an interest, the Court held that New York's pre-removal procedures provided foster parents with adequate procedural protections. *See id.* at 847, 97 S.Ct. 2094.

The *OFFER* Court's discussion of foster family relationships provides guidance on the considerations relevant to determining whether (and what sort of) foster family relationships might involve a due process liberty interest. Indeed, as the Second Circuit Court of Appeals acknowledged in *Rivera*, 696 F.2d at 1024, the Supreme Court suggested in *dictum* in *OFFER* that long-term foster parents may be entitled to some due process protection in view of the mutual care and support developed in these relationships:

> No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the

> same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.

OFFER, 431 U.S. at 844, 97 S.Ct. 2094. The *OFFER* Court went on to note three distinctions between foster parent-child relationships and biological families that it viewed as important. First, there is generally no biological relationship between foster parents and foster children. *See id.* at 845, 97 S.Ct. 2094. Second, there is a "virtually unavoidable" tension between the rights of biological parents and those of foster parents. *Id.* at 846, 97 S.Ct. 2094. Third, "whatever emotional ties may develop between foster parent and foster child," the relationship has its origins, "in state law and contractual arrangements." *Id.* at 845, 97 S.Ct. 2094. As to this third consideration, the Court noted that "[w]hile the Court has recognized that liberty interests may in some cases arise from positive-law sources, . . . in such a case, and particularly where, as here, the claimed interest derives from a knowingly assumed contractual relation with State, it is appropriate to ascertain from state law the expectations and entitlements of the parties." *Id.* at 845-46, 97 S.Ct. 2094; *see also Rivera*, 696 F.2d at 1024 (identifying three distinguishing factors of foster families discussed in *OFFER*).

In view of these considerations, Ms. Rodriguez's relationship with Andrew seems to present a relatively strong case for the recognition of a liberty interest in a foster parent's relationship with her foster child. Andrew was placed in foster care with Ms. Rodriguez in his first month of life, he never knew his biological parents, and he remained continuously in Ms. Rodriguez's care until

his removal on March 18, 1994. During this time, the record suggests that Ms. Rodriguez held the same place in his emotional life, and fulfilled the same socializing functions, as a biological parent or relative. Because Andrew's biological mother's parental rights were terminated prior to the time of his removal, there is no foreseeable, much less unavoidable, conflict between the rights of Andrew's biological parents to a relationship with Andrew and recognition of a liberty interest in Ms. Rodriguez's relationship with him. Furthermore, at the time of his removal, Ms. Rodriguez had entered into an Adoptive Placement Agreement with McCloskey. The Adoptive Placement Agreement, entered into in August 1993, formally expressed Ms. Rodriguez's intention to adopt Andrew. Indeed, as noted above, two months after the Adoptive Placement Agreement had been signed, in November 1993, McCloskey reported to CWA that its goal was "adoption finalization" for Andrew with Ms. Rodriguez, and that it was awaiting a court date for adoption finalization.

Thus, unlike the foster parents in decisions subsequent to *OFFER* that have found that foster parents do not have a liberty interest in their relationships with their foster children,[2] as a prospective adoptive parent who

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[2] *See, e.g., Wildauer v. Frederick County*, 993 F.2d 369, 372 (4th Cir.1993) (holding that plaintiff non-licensed foster parent did not have liberty interest in relationship with foster children); *Renfro v. Cuyahoga County Dep't of Human Servs.*, 884 F.2d 943, 944 (6th Cir.1989) (holding that foster parents' relationship with foster child did not involve a liberty interest); *Sherrard v. Owens*, 484 F.Supp. 728, 741-42 (W.D.Mich.1980), *aff'd*, 644 F.2d 542 (6th Cir.1981) (per curiam) (same); *Kyees v. County Dep't of Public*

had entered into an Adoptive Placement Agreement, Ms. Rodriguez cannot be said to have expected her relationship with Andrew to end. *See Thelen v. Catholic Soc. Servs.*, 691 F.Supp. 1179, 1184 (E.D.Wis.1988) (distinguishing liberty interest of prospective adoptive parents from foster parents). By entering into the Adoptive Placement Agreement, the State (through McCloskey) expressed its interest in Andrew's adoption by Ms. Rodriguez, so long as McCloskey continued to view adoption as in Andrew's best interest. Hence, while Ms. Rodriguez's expectations as to Andrew at the outset of her relationship with him were not necessarily permanent, by the time that she entered the Adoptive Placement Agreement, such intentions and expectations of permanency had formed.

The reasonableness of Ms. Rodriguez's expectations must be assessed in the context of relevant New York statutes and regulations, and her contract with McCloskey. *See OFFER*, 431 U.S. at 845-46, 97 S.Ct. 2094 (noting that where claimed liberty interest derives from contractual relations with state it is appropriate to ascertain from state law the expectations of the parties).[3] New

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Welfare, 600 F.2d 693, 695, 697 (7th Cir.1979) (per curiam) (same); *Drummond v. Fulton County Dep't of Children's Services*, 563 F.2d 1200, 1207 (5th Cir.1977) (en banc) (same); *but see Rivera v. Marcus*, 696 F.2d 1016, 1024-25 (2d Cir.1982) (holding that relationship between half-sister and foster parent of half-sister and foster child had constitutional protected liberty interest in preserving integrity and stability of family); *Brown v. County of San Joaquin*, 601 F.Supp. 653, 662-63 (E.D.Cal.1985) (holding that foster parent had liberty interest in foster care relationship).

[3] As the Court noted in *Dietz v. Damas*, 932 F.Supp. 431, 453-54 (E.D.N.Y.1996), "[t]he establishment of a liberty interest on the basis of state law, even when the doctrine was most in

York state law, as well as the Adoption Placement Agreement signed by Ms. Rodriguez, make clear that until the child is legally adopted, legal custody remains with the authorized state agency, which may remove the child if the agency believes that it in the child's best interest. *See* N.Y. Soc. Servs. Law § 383(2);[4] Pl. Exh. 60.[5]

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favor, was largely limited to state law regarding the conditions of confinement in prisons and other institutions." *Id.* at 453. The Supreme Court's decision in *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), has been read by the Second Circuit Court of Appeals as "calling into question the continuing viability of our cases holding that New York regulations afford inmates a liberty interest in remaining free from administrative segregation." *Rodriguez v. Phillips*, 66 F.3d 470, 479 (2d Cir.1995). There has, however, been only limited application of *Sandin* outside the context of prison regulations. *See Dietz*, 932 F.Supp. at 454. In view of the fact that the Supreme Court in *OFFER* explicitly contemplated looking to state law to discern the expectations of foster parents, the Court bases its holding that there is a liberty interest in Ms. Rodriguez's and Andrew's relationship on the character of the relationship between Ms. Rodriguez and Andrew viewed in the context of applicable state law.

[4] N.Y. Soc. Serv. Law § 383(2) provides:

> The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.

[5] The Adoption Placement Agreement provides that "legal custody remains with Card. McCloskey and that this adoptive placement agreement remains in effect until the date of legal

However, unlike Georgia state law discussed in *Drummond*, 563 F.2d at 1207, and Indiana state law discussed in *Kyees*, 600 F.2d at 698, New York statutory and regulatory law does not envision foster parents merely as "an alternative to institutional care for what is clearly designated as a transitional phase of the child's life." *Drummond*, 563 F.2d at 1207. Instead, New York foster care law not only permits, but promotes, adoption by long-term foster parents; New York state's statutory and regulatory scheme governing foster care contains several provisions reflecting the view that foster parents are favored adoption applicants for their foster care children. Specifically, as plaintiff points out, New York law includes the following provisions:

1. "Foster parents having had continuous care of a child, for more than twelve months, through an authorized agency, shall be permitted as a matter of right, as an interested party to intervene in any proceeding involving the custody of the child." N.Y. Soc. Serv. Law § 383(3).

2. When the family court accepts the surrender of a child for adoption, "the court shall inquire whether any foster parent or parents with whom the child resides, or any relative

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adoption." It also specifies that "legal adoption will take place after both Card. McCloskey and we agree that it is in the child's best interest," and that "[i]f at any time prior to legal adoption it is determined by the agency or by us that the child should be removed from our home, we will cooperate with the agency in carrying this out in a way that serves the best interest of the child in the judgment of the agency." (Def. Exh. E at Exh. A; Pl. Exh. 60.)

of the child, or other person, seeks to adopt such child. If such person or persons do seek to adopt such child, such person or persons may submit, and the court shall accept, all such petitions for the adoption of the child, together with an adoption home study. . . . The court shall thereafter establish a schedule for completion of other inquiries and investigations necessary to complete review of the adoption of the child and shall immediately set a schedule for completion of the adoption." N.Y. Soc. Serv. Law § 383-c(10).

3. An authorized agency "must . . . inform foster parents that a child in their care who is free or to be freed for adoption and inform foster parents who have not completed an application to become an adoptive parent of the procedure for applying to adopt the child." N.Y. Comp.Codes R. & Regs. tit. 18 § 421.19(a)(1).

4. "Any adult husband and his adult wife and any adult unmarried person, who, as foster parent or parents, have cared for a child continuously for a period of twelve months or more, may apply to such authorized agency for the placement of said child with them for the purpose of adoption, and if said child is eligible for adoption, the agency shall give preference and first consideration to their application over all other applications for adoptive placements." N.Y. Soc. Serv. Law § 383(3).

5. In evaluating adoption applicants, authorized agencies "shall accept [that] . . . [a]pplicants seeking children having these characteristics, foster parents seeking to

adopt a child who has resided in their home 12 continuous months . . . shall receive first priority for adoption studies." N.Y. Comp.Codes R. & Regs. tit. 18 § 421.13(a).

6. "In any agreement between an authorized agency and foster parents with whom a child or children are to be placed or boarded, there shall be contained therein the following language: 'It is duly acknowledged by the parties hereto that pursuant to the law of the state of New York, a foster parent shall have preference in any proceedings to adopt the child subject to this agreement upon such child having been in the custody of such foster parent for a period in excess of twelve months.' " N.Y. Soc. Serv. Law § 374(1-a).

7. Foster parents "in whose home the child resided or resides at or after the expiration of a continuous period of twelve months in foster care" shall receive notice of a hearing to review the foster care status of a child who has been freed for adoption, among other events. N.Y. Soc. Serv. Law § 392(4)(c).

8. An adoption subsidy is available for "hard to place children." Among several other grounds, "the child is hard to place with parent(s) other than his/her present foster parent(s) because he/she has been in care with the same foster parent(s) for 18 months or more prior to the signing of the adoption placement agreement by such foster parent(s) and has developed a strong attachment to his/her foster parent(s) while in such care and separation from the foster parent(s) would adversely affect the child's

development." N.Y. Comp.Codes R. & Regs. tit. 18 § 421.24(a)(3)(f).

These provisions for notice to foster parents of proceedings involving the legal custody status of their foster children of more than twelve months indicate that New York recognizes that such long-term foster parents have an interest in their foster children's custody status. New York's provisions for long-term foster parents' applications for adoption of their foster children to receive priority over other applications for adoption home studies also indicate that New York encourages foster parents to adopt their foster children. Indeed, this provision combined with the adoption subsidy for foster parents attempting to adopt a foster child who has been in their care for more than 18 months provides a statutory incentive to potential adoptive parents to become foster parents as a means to adoption.

In *Procopio v. Johnson,* 994 F.2d 325 (7th Cir.1993), the Seventh Circuit Court of Appeals examined a similar preference for foster parents in the adoption process in Illinois law. In *Procopio,* a couple wishing to adopt a child had been instructed by an adoption agency that they had a better chance if they became foster parents. The couple became foster parents to a two-month old girl, and cared for her continuously for over four years; her biological parents then successfully petitioned the Illinois juvenile court for custody over the girl. *See id.* at 326-27. Despite the girl's biological parents' drug and criminal records, the Illinois Department of Child and Family Services had developed a plan to work toward the goal of returning the girl to her biological parents. This plan was interrupted when the state court found the child's biological

parents unfit to care for the child. The plan was again pursued, this time with success, once the child's biological parents were living together and enrolled in drug treatment programs. *See id.* at 327. After the child was returned to her parents' custody, the foster parents argued that they had a liberty interest in their relationship with her based on an Illinois statute, which provided that a child's legal guardian "shall give preference and first consideration to [the foster parents'] application over all applications for adoption but the guardian's final decision shall be based on the welfare and best interest of the child." *Id.* at 328 (quoting Ill.Rev.Stat. ch. 40 ¶ 1519.1(b)). In response to this argument, the Seventh Circuit held that this statute did not create a liberty interest in the foster parents' family relationship. The *Procopio* court reasoned that this statutory preference did not rise to the level of expectancy or an entitlement because Illinois state law provides: (1) that foster parents wishing to adopt obtain permission from the natural parents or legal guardian if parental rights have been terminated, and (2) that the juvenile court has "sole discretion" to make the "final determination" about the adoption. *Id.* at 329.

This Court does not reach the same conclusion as *Procopio* despite the similarity in New York's and Illinois's statutory provisions granting a preference for foster parents as adoptive parents. Unlike the situation in *Procopio,* Andrew's biological mother's parental rights had been terminated; neither McCloskey nor CWA had plans to return him to his biological mother or to find his biological father. Further, pursuant to New York's provisions giving preference for adoption to long term foster parents, Ms. Rodriguez had entered into an Adoptive

Placement Agreement with McCloskey at the time of his removal, and was awaiting adoption finalization from the family court. Thus, while McCloskey and the state court ultimately would decide whether Ms. Rodriguez, as a prospective adoptive foster parent, would gain permanent custody of Andrew, it cannot be said that Ms. Rodriguez, with whom Andrew had been placed first pursuant to a foster care agreement and then under an Adoptive Placement Agreement, had a reasonable expectation under New York law that her relationship with Andrew would eventually be terminated. *See Thelen v. Catholic Soc. Servs.*, 691 F.Supp. 1179, 1185 (E.D.Wis.1988) (holding under Wisconsin law that prospective adoptive parents had a limited constitutionally protected liberty interest in family unit). Accordingly, viewing the character of the relationship between Ms. Rodriguez and Andrew in the context of New York law, the Court holds that Ms. Rodriguez had a liberty interest within the Fourteenth Amendment's Due Process Clause in her relationship with her foster and prospective adoptive child Andrew at the time of his removal from her home on March 18, 1994. This holding recognizes such a liberty interest in only a discretely identifiable set of foster parents, (1) whose foster children's biological parents' parental rights have been terminated, (2) who have cared for their foster children continuously for more than twelve months since the child's infancy, (3) and who have entered into an adoptive placement agreement for their foster child. The Court thus rejects defendants' suggestion that recognizing a liberty interest in the context of this case will open the door to a flood of federal litigation reviewing unique aspects of foster family relationships.

2. *The Process That Was Due*

"Whether procedural due process must be afforded because a 'liberty' or 'property' interest is within the Fourteenth Amendment's protection, there must be determined 'what process is due' in the particular context." *OFFER*, 431 U.S. at 847, 97 S.Ct. 2094. The Court now considers whether the procedures employed by defendants on and after Andrew's removal were constitutionally adequate. The quantum of process constitutionally required "is not subject to specific measurement." *Rivera*, 696 F.2d at 1026.

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." . . . Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Id. at 1026-27 (internal citations omitted). Due process fundamentally requires that the aggrieved party be provided with an opportunity to be heard, " 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). The "meaningfulness" of the

process is considered in light of three factors enunciated by Justice Powell for the Court in *Mathews*:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335, 96 S.Ct. 893; *see Zinermon v. Burch*, 494 U.S. 113, 127, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) (quoting same); *Goetz v. Crosson*, 41 F.3d 800, 803 (2d Cir.1994), *cert. denied*, 516 U.S. 821, 116 S.Ct. 80, 133 L.Ed.2d 39 (1995); *Rivera*, 696 F.2d at 1027. The Court analyzes under the *Mathews* balancing test plaintiff's claim that Ms. Rodriguez did not receive adequate notice and opportunity to be heard (1) to contest Andrew's removal, and (2) to challenge McCloskey's denial of her requests to visit Andrew. In both of these inquiries, the Court is mindful of the Supreme Court's guidance in *OFFER*: "We deal here with issues of unusual delicacy, in an area where professional judgments regarding desirable procedures are constantly and rapidly changing. In such a context restraint is appropriate on the part of courts called upon to adjudicate under the Constitution." *OFFER*, 431 U.S. at 855-56, 97 S.Ct. 2094.

Plaintiff alleges several distinct violations of the process that she was due. As mentioned above, plaintiff alleges that defendants violated plaintiff's rights to due

process as guaranteed by the Fourteenth Amendment by (1) removing Andrew from Ms. Rodriguez's home on March 18, 1994 without providing Ms. Rodriguez with pre-removal notice and an opportunity to be heard; (2) not providing timely notice of this removal or timely post-removal opportunity to be heard, and (3) not providing Ms. Rodriguez a timely opportunity to contest McCloskey's denial of her requests to visit Andrew. The Court addresses these claims in turn.

a. *Was an Emergency Removal Warranted?*

Defendants argue that McCloskey's removal of Andrew on March 18, 1994 constituted an emergency removal under New York's regulatory provisions governing notice to foster parents in the event of removal, N.Y. Comp.Codes R. & Regs. tit. 18 § 443.5,[6] and the analogous

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[6] N.Y. Comp.Codes R. & Regs. tit. 18 § 443.5 provides:

(a) Whenever a social services official or another authorized agency acting on his behalf proposes to remove a child in foster family care from the foster family home, he or such other authorized agency, as may be appropriate, shall notify the foster family parents, in writing, of the intention to remove such child. Such notification shall be given at least 10 days prior to the proposed effective date of the removal, except where the health or safety of the child requires that the child be removed immediately from the foster family home. Such notification shall further advise the foster family parents that they may request a conference with the social services official or a designated employee of the local social services district at which time the foster parents, with or without a representative, may appear to have the

New York City regulation, SSC Procedure No. 5 (Def. Exh. ¶ at Exh. C.). Defendants contend that these two

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proposed action reviewed, be advised of the reasons therefor and be afforded an opportunity to submit reasons why the child should not be removed. Each social services official shall instruct and require any authorized agency acting on the official's behalf to furnish notice in accordance with the provisions of this section. Foster parents who do not object to the removal of the child from their home may waive in writing their right to the 10-day notice, provided, that such waiver shall not be executed prior to the social services official's or authorized agency's determination to remove the child from the foster home and the receipt by the foster parents of notification of such determination.

(b) Upon the receipt of a request for such conference, the social services official shall set a time and place for such conference to be held within 10 days of receipt of such request and shall send written notice of such conference to the foster family parents and their representative, if any, and to the authorized agency, if any, at least five days prior to the date of such conference.

(c) The social services official shall render and issue his decision as expeditiously as possible, but not later than five days after the conference, and shall send a written notice of his decision to the foster family parents and their representative, if any, and to the authorized agency, if any. Such decision shall advise the foster family parents of their right to appeal to the department and request a fair hearing in accordance with section 400 of the Social Services Law.

(d) In the event there is a request for a conference, the child shall not be removed from the foster family home until at least three days after the notice of decision is sent, or prior to the proposed effective date of removal, whichever occurs later.

regulatory provisions do not require notice to foster parents of the authorized agency's intent to remove the child prior to an emergency removal. Therefore, defendants maintain that McCloskey was not required to give Ms. Rodriguez either notice or an opportunity to be heard prior to removing Andrew. In response, plaintiff urges that Ms. Rodriguez was entitled, under both New York law and the Constitution, to pre-removal notice and opportunity to be heard because, they contend, Andrew's removal was not an emergency, or, at a minimum, whether it was an emergency is a question of fact for trial.

Both § 443.5 and SSC Procedure No. 5 exempt emergency removals from the requirements of pre-removal notice and opportunity to be heard. Section 443.5 provides that "[s]uch notification shall be given at least 10 days prior to the proposed effective date of the removal, except where the health or safety of the child requires that the child be removed immediately from the foster family home." Similarly, SSC Procedure 5 states that pre-removal notice requirements "do not apply when the health and safety of a child are endangered." (Def. Exh. P. at Exh. C.) "[I]t was, and remains, equally well established that officials may temporarily deprive a parent of custody in 'emergency' circumstances 'without parental

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(e) In any agreement for foster care between a social services official, or another authorized agency acting on his behalf, and foster parents, there shall be contained therein a statement of a foster parent's rights provided under this section.

consent or a prior court order.' " *Robison v. Via*, 821 F.2d 913, 921 (2d Cir.1987) (quoting *Duchesne v. Sugarman*, 566 F.2d 817, 826 (2d Cir.1977)) (other citations omitted). Where there is an objectively reasonable basis for government officials to believe that a threat to a child's health or safety is imminent, the Constitution does not prevent government officials from removing a child from his or her parent's custody without a prior hearing. *See Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir.1996); *Dietz*, 932 F.Supp. at 444 (noting same).

The Second Circuit Court of Appeals has instructed that "[e]mergency circumstances mean circumstances in which the child is immediately threatened with harm, . . . , for example, where there exists an 'immediate threat to the safety of the child,' . . . or where the child is left bereft of care and supervision, . . . or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence. . . . " *Hurlman v. Rice*, 927 F.2d 74, 80 (2d Cir.1991). Defendants argue that there were emergency circumstances justifying removal in this case because Andrew was left "bereft of care and supervision." *Id.; see also Duchesne*, 566 F.2d at 825-26 (concluding circumstances justified emergency removal where children were left bereft of care). Defendants also point out that New York foster care regulations require that foster parents agree "never to leave children under the age of 10 alone without competent adult supervision. . . . " N.Y. Comp.Codes R. & Regs. tit. 18 § 444.5(c)(3), a requirement that was printed in the Foster Care Manual McCloskey provides to its foster parents. (Def.Exh. U.)

When a New York state court reviews an administrative decision to remove a child, the court asks whether

the removal decision was arbitrary or capricious. *See, e.g., Banks-Nelson v. Bane*, 214 A.D.2d 338, 625 N.Y.S.2d 131, 132 (1st Dep't 1995); *Peters v. McCaffrey*, 173 A.D.2d 934, 569 N.Y.S.2d 797, 798 (3d Dep't 1991). Relying on this law, plaintiff argues that McCloskey's decision to remove Andrew was arbitrary or capricious. However, when reviewing procedural due process challenges to whether there were emergency circumstances to justify the removal of a child from his or her parents' custody, the Second Circuit Court of Appeals asks whether there is "an objectively reasonable basis for believing that a threat to the child's health or safety is imminent." *Gottlieb*, 84 F.3d at 520; *Cecere v. City of New York*, 967 F.2d 826, 829 (2d Cir.1992).

The Court construes plaintiff's contentions that the removal was arbitrary or capricious as arguments that there was no objectively reasonable basis for believing there was an imminent danger to Andrew (and Thomas) by leaving them without adult supervision. Plaintiff contends that McCloskey's decision to remove Andrew was without such a basis in view of the facts that: (1) Ms. Rodriguez had a good history as a foster parent, (2) McCloskey had encouraged Ms. Rodriguez to be more trusting of neighbors and other family members in caring for the foster children, (3) Ms. Rodriguez had arranged for a neighbor to babysit on the day of Andrew's removal, (4) Ms. Rodriguez had been informed that this neighbor would return in a few minutes, (5) Ms. Rodriguez had child-proofed her home, (6) Edwin was almost 13 years old, and was capable of supervising the children, (7) a next-door neighbor was available in case of emergency and informed the McCloskey case worker of

that fact, (8) Mr. Monplaisir found the situation in Ms. Rodriguez's home safe enough to leave to telephone McCloskey, and (9) there were two babysitters certified by McCloskey in the same apartment building.

Even accepting plaintiff's view of these facts, plaintiff cannot avoid the fact that there was no adult present to supervise Ms. Rodriguez's three and four-year old children when Mr. Monplaisir arrived for a scheduled visit to the home, nor that no adult arrived to assume responsibility for the children during the time (of at least two hours) that he was present. Further, Mr. Monplaisir observed that Edwin was having difficulty keeping the children under control, and appeared to be overwhelmed by the situation. Thus, in the time before McCloskey removed the children, Ms. Rodriguez had violated New York's foster care regulations requiring that foster children under 10 years must never be left without adult supervision. *See* N.Y. Comp.Codes R. & Regs. tit. 18 § 444.5(c)(3).

In the context of this case, this violation itself provides an objective basis for McCloskey's belief that leaving a three and four-year old in the care of only a twelve-year old boy posed an imminent threat to the health or safety of the children. But even without this regulatory violation, the Court would conclude that no reasonable juror could find that McCloskey lacked an objective basis to believe that Andrew and Thomas were left bereft of supervision so as to pose a sufficient threat to these children's health or safety to justify an emergency removal. As long as there is an objective basis for fear of imminent injury to the children, it is not the role of the court (either on a motion or through a jury verdict) to

second-guess, with the benefit of hindsight, the case worker's and foster agency officials' on-the-spot determination to remove a child left without adult supervision. Accordingly, the Court grants summary judgment in favor of defendants as to plaintiff's claim that the circumstances did not justify an emergency removal, and thus dismisses plaintiff's claim that she was entitled to pre-removal notice and an opportunity to be heard.

b. *Post-Removal Notice and Opportunity to* [sic] *Heard*

"[I]n those 'extraordinary situations' where deprivation of a protected interest is permitted without prior process, the constitutional requirements of notice and an opportunity to be heard are not eliminated, but merely postponed." *Duchesne*, 566 F.2d at 826 (citing *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)). Although Ms. Rodriguez contacted McCloskey by telephone on the day of Andrew's removal to determine what had happened to her foster children, Ms. Rodriguez did not received [sic] written notice of Andrew's removal, including notification of her rights and procedures to contest removal, until approximately June 15 or June 16, 1998, almost three months after Andrew's removal. Ms. Rodriguez's first scheduled opportunity to be heard to contest Andrew's removal was a Fair Hearing before a New York Administrative Law Judge on June 15, 1994, which was adjourned to July 15, 1994. In the interim, on June 28, 1994, an Independent Review was conducted, at which time Ms. Rodriguez had her first opportunity to be heard to contest Andrew's removal.

Defendants take the position that New York State and New York City regulations governing removals of foster children do not require written notice of removal subsequent to an emergency removal, notifying her of her opportunity to contest the removal, nor do they require an opportunity to be heard to contest the removal within ten days, as N.Y. Comp.Codes R. & Regs. tit. 18 § 443.5 plainly requires for non-emergency removals. Defendants thus maintain that Ms. Rodriguez's New York state and city procedural rights to contest Andrew's removal were not violated. McCloskey's general agency practice is not to provide written notice of removal in emergency removals, (McMurray Dep. at 170), but as a courtesy to the foster parents, to provide oral notice of removal. (McLoughlin Dep. at 158.)[7] Plaintiff asserts that N.Y. Comp.Codes R. & Regs. tit. 18 § 443.5 requires written notice of removal contemporaneously with the removal and the opportunity to appear at a conference ten days after it is requested in emergency removals. (Pl. Mem. at 62-64.)

Neither the parties nor the Court were able to locate any decisions addressing whether the § 443.5 requirements for written notice and an opportunity to contest a removal apply to emergency removals of foster children. Because the plaintiff foster parents in *OFFER* were challenging the constitutionality of New York's pre-removal procedures, not its post-removal procedures for emergency removals, the *OFFER* Court did not have occasion

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[7] In this regard, the Court notes that it rejects defendants' argument that their actions were mere negligence, and thus not subject to § 1983 liability.

to address notice and hearing requirements in emergency removals.

However, "[f]ederal constitutional standards rather than state statutes define the requirements of procedural due process." *Robison*, 821 F.2d at 923. As a result, not every violation of a procedure required by state law is a violation of due process protected by the Constitution. *See id.*; *Doe v. Connecticut*, 911 F.2d 868, 869 (2d Cir.1990); *Duchesne*, 566 F.2d at 827; *Dietz*, 932 F.Supp. at 453. Because this Court faces a question of whether plaintiff's due process rights were violated, the Court declines to resolve the parties' dispute as to whether § 443.5 requires notice and a post-removal opportunity to be heard in emergency removals.

In the context of an emergency removal of a biological child from its parents' custody, the Second Circuit has specified that the delay in providing a hearing must be short:

> Where there has been an emergency removal of a child from a parent's custody without a hearing, due process requires that the state procedures provide the parent an opportunity to be heard at a reasonably prompt time after the removal.

Gottlieb, 84 F.3d at 520; *see also Duchesne*, 566 F.2d at 828 (delay of twenty-seven months in providing biological parent opportunity to be heard violated constitutional due process); *Cecere*, 967 F.2d at 830 (four day assertion of custody in emergency situation permissible); *cf. Lossman v. Pekarske*, 707 F.2d 288, 291 (7th Cir.1983) (twelve day delay in providing hearing did not violate due process).

Subsequent to *Gottlieb*, *Gottlieb*'s "reasonably prompt" opportunity to be heard requirement has been applied by only one district court. In *Sundbye v. Ogunleye*, 3 F.Supp.2d 254, 265 (E.D.N.Y.1998), the court held that CWA's delay of six weeks in filing of family court petition of abuse "was not even close to 'reasonably prompt.' " *Id.* *Cf. Whisman v. Rinehart*, 119 F.3d 1303, 1310-11 (8th Cir.1997) (hearing held seventeen days after emergency removal was not sufficiently prompt and thus did not provide mother with an adequate post-deprivation remedy). Thus, when the state removes a child from his biological parents' custody, it must provide an opportunity to contest the removal within weeks – not months – after the removal.

The Court examines the process provided to Ms. Rodriguez under the *Mathews* test in view of the Second Circuit's treatment of post-removal due process challenges of natural parents. *See Mathews*, 424 U.S. at 333, 96 S.Ct. 893. The first factor is the private interest affected by the deprivation. Even though Ms. Rodriguez's interest in a prompt hearing to determine the appropriateness of Andrew's removal (as well as its duration) may be less than that of a parent who is also the legal guardian of the child, Ms. Rodriguez's interest is a strong one. Like a biological parent, Ms. Rodriguez had cared for Andrew since his infancy and expected that he would be with her permanently. Where, as here, a child has been in continuous custody of a foster parent since early infancy, the Court sees no basis for distinguishing the foster child's interest in a prompt hearing from that of a biological child or an adopted child.

In the context of an emergency removal, the risk of an erroneous deprivation – the second *Mathews* factor – is comparable for children removed from their biological parents' custody and for foster children removed from their foster parents' care. In both cases, the aggrieved parent has no opportunity to explain or defend the conditions that provoked the state to remove the child. *See Rivera*, 696 F.2d at 1027-28 (commenting that removal procedures that provide foster parents no opportunity to explain or defend their fitness create potential for erroneous deprivation). Insofar as social workers monitor foster parents more closely than they typically monitor biological parents, social workers deciding whether circumstances warrant an emergency removal may have more background information about the foster family than they have about a biological family. Still in both cases there is significant potential for an erroneous deprivation of the parents' and child's private interests in remaining together.

The interest and burden on the Government – the third *Mathews* factor – is also comparable regardless of whether the child was removed from his biological parents' custody or the care of a pre-adoptive foster parent, such as Ms. Rodriguez. Furthermore, in view of New York's regulatory requirement for a pre-removal opportunity to be heard for all foster parents in the event of non-emergency removals, *see* N.Y. Comp.Codes R. & Regs. tit. 18 § 443.5, providing such a post-deprivation hearing in emergency removals should not be a heavy burden on the state. The procedural mechanisms and institutions that would be needed for post-deprivation

hearings are already provided in non-emergency removals.

In view of Ms. Rodriguez's interest in not being erroneously separated from Andrew, the potential for such error in an emergency removal, and the fact that the state already provides an opportunity to be heard in non-emergency foster care removals, the Court finds that the delay from March 18, 1994 until June 15, 1994 in providing written notice of removal, and until June 28, 1994 in providing an opportunity to be heard to contest the removal, was not reasonably prompt, and therefore violated plaintiff's rights to due process guaranteed by the Due Process Clause of the Fourteenth Amendment. For these reasons, the Court denies defendants' motion for summary judgment as to plaintiff's claim that the delay in proving Ms. Rodriguez post-removal notice and opportunity to be heard violated her procedural due process rights.

c. *Denial of Visitation*

Plaintiff argues that defendants' failure to provide Ms. Rodriguez a timely opportunity to be heard as to why she should have been allowed to visit Andrew, during the period that he was removed from her care, also violated constitutional due process. On March 31, 1994, Ms. Rodriguez requested through her attorney to be allowed to visit Andrew. On or about March 18, 1994, McCloskey submitted a Report of Suspected Child Abuse or Maltreatment to the New York State Central Registry; that report initiated an investigation into the circumstances surrounding Andrew's removal by OCI. On April

6, 1994 McCloskey's attorney advised Ms. Rodriguez that her request for visitation was being evaluated, pending the outcome of OCI's investigations. At the June 15, 1994 court conference before an Administrative Law Judge, Ms. Rodriguez's attorney again requested that Ms. Rodriguez be allowed to visit Andrew. McCloskey allowed Ms. Rodriguez to visit Andrew on June 27, 1994, and on July 8, 1994.

Courts have held that the reduction of biological parents' visitation rights regarding children over whom the state has asserted legal custody implicate the Due Process Clause, because such a decision "may infringe upon a parent's interest in the 'care, custody, and management of their child.' " *Fitzgerald v. Williamson*, 787 F.2d 403, 408 (8th Cir.1986). Similarly, Ms. Rodriguez had an interest in visiting Andrew, if only to provide him with her own explanation of the separation, attempt to reduce his sense of abandonment, and ease her own concerns about his well-being. This interest in visiting Andrew during the time that he was removed from her care derives from her underlying interest in her relationship with Andrew. In view of the Court's holding above that Ms. Rodriguez has a constitutionally protected liberty interest in the stability of her relationship with Andrew, the Court concludes that the deprivation of any visitation between Ms. Rodriguez and Andrew during the time of his removal also implicates a constitutionally protected liberty interest.

The Court's *Mathews* analysis is similar for both Ms. Rodriguez's challenge to the promptness of the hearing she was provided to contest the denial of visitation, and her challenge to the promptness of her opportunity to be

heard to contest the removal. Ms. Rodriguez's interest in Andrew's returning to her care also included an interest in visiting him between the time of his removal and her opportunity to contest it. Further, Ms. Rodriguez has an interest in visiting Andrew independent of her interest in his return: to comfort him and to offer some explanation for their separation. The risk of erroneous deprivation is similar to that involved in the underlying removal decision (if lessened slightly because the agency may have had more time to assess the basis for the removal decision). Where, as here, the child would not be endangered by supervised visits, and visits are likely to be important in countering the child's sense of abandonment, the government's goal to further the best interest of the child is not in conflict with allowing an opportunity to contest the failure to provide visitation. Because foster care agencies have resources for facilitating supervised visitation, and because of the potential benefit to the child of having contact with the only parent he has ever known, the Court holds that the failure of defendants to provide Ms. Rodriguez any opportunity to contest the decision not to allow her to visit Andrew from March 18, 1994 until June 28, 1994 violated Ms. Rodriguez's due process rights. Accordingly, the Court denies defendants' motion for summary judgment as to plaintiff's visitation claim.

D. *Article 78 Exhaustion*

Defendants contend that plaintiff has no cause of action under § 1983 because an Article 78 hearing, together with judicial review of the Article 78 decision, is plaintiff's exclusive legal remedy. Defendants are correct that an appeal from an Article 78 proceeding is a foster

parent's exclusive remedy to challenge the removal of foster child and to re-obtain foster care for the child. As the court in *In re Dina Michelle S.*, 236 A.D.2d 544, 653 N.Y.S.2d 677, 678 (2d Dep't 1997), explained:

> Social Services Law § 400 and 18 NYCRR 443.5 outline a clear procedure for foster parents aggrieved by a decision to relocate their foster children. First, the foster parents may request a departmental review of the agency's decision. They may then request a "fair hearing" to challenge the outcome of the departmental review. Finally, if still aggrieved, the foster parents may commence a CPLR 78 proceeding. This three-step scheme satisfies the requirements of due process and provides the sole remedy for foster parents who wish to challenge the removal of a child. . . .

Id. However, as plaintiff points out, Ms. Rodriguez does not seek the return of her foster child. If that were her requested relief, then the prescribed statutory procedure would be her exclusive remedy. Rather, plaintiff seeks a declaratory judgment and monetary damages. The Court is not persuaded by defendants' suggestion that despite this difference in the relief plaintiff seeks, plaintiff is precluded from pursuing a § 1983 action because she pursued her state remedies to their conclusion. In this regard, defendants argue that § 1983 does not provide a remedy when the governing statute provides an exclusive remedy for violation of its terms. But each of the decisions upon which defendants rely, *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 28 n. 21, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20, 101 S.Ct. 2615,

69 L.Ed.2d 435 (1981); *Irby v. Sullivan*, 737 F.2d 1418, 1428 (5th Cir.1984), addresses a plaintiff who seeks to recover for a violation of a federal statute. When the governing federal statute contains remedial devices that are "sufficiently comprehensive," *Middlesex*, 453 U.S. at 19-20, 101 S.Ct. 2615, a § 1983 action is precluded. *See id.*; *Irby*, 737 F.2d at 1428 (Title VII provides sufficiently comprehensive remedial device to support an inference that Congress intended those remedies to be exclusive, and a § 1983 action is precluded). Because plaintiff seeks to recover for a violation of a constitutionally protected right, as opposed to a right protected by a federal statute, there is no such bar. Relying on *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir.1989), defendants also argue that plaintiff's pursuit of her state statutory remedies bars her § 1983 claim. But in *Spielman*, the court applied § 1983 and concluded that the Kansas procedures provided to the plaintiffs, which the plaintiffs utilized, did not violate due process. *Id.* at 1385. Because plaintiff seeks relief other than return of a foster child, the New York statutory scheme, including an Article 78 proceeding, does not provide the exclusive remedy. Accordingly, the Court rejects defendants' argument that plaintiff's § 1983 action is barred.

E. *Qualified Immunity*

Individual defendants Marjorie McLoughlin and Barbara McMurray argue that they are immune from liability under the doctrine of qualified immunity. The doctrine of qualified immunity "shields public officials from liability

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, . . . or insofar as it [is] objectively reasonable for them to believe that their acts d[o] not violate those rights." *Whalen v. County of Fulton*, 126 F.3d 400, 404 (2d Cir.1997) (internal citations and quotes omitted).

The individual defendants are not entitled to qualified immunity because they are not "public officials." In *Richardson v. McKnight*, 521 U.S. 399, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997), the Supreme Court noted that the performance of a governmental function by a private defendant does not in itself entitle the private defendant to assert a qualified immunity defense. The Court explained that under *Wyatt v. Cole*, 504 U.S. 158, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992), "private actors are not *automatically* immune (i.e., § 1983 immunity does not automatically follow § 1983 liability)." *Id.* at 2108 (emphasis in original). *Richardson* set forth a two-part analysis to determine whether a private defendant should be entitled to qualified immunity, based on considerations of history and public policy. Neither consideration compels a grant of qualified immunity to the individual defendants in this case.

The *Richardson* Court explained that immunity is proper only where there is "evidence of an historical tradition of immunity for private parties carrying out these functions." *Id.* at 2105. Defendants have offered no evidence that there is a tradition of governmental immunity for private parties engaged in foster care, *see White v. Chambliss*, 112 F.3d 731, 738 (4th Cir.1997) (" 'The care of

foster children is not traditionally the exclusive prerogative of the State.' ") (quoting *Milburn v. Anne Arundel County Dep't of Soc. Svcs.*, 871 F.2d 474, 479 (4th Cir.1989)), and even foster care workers employed by the government are not necessarily entitled to qualified immunity, *see Doe v. Jefferson County*, 985 F.Supp. 66, 71 (N.D.N.Y.1997). Although the court in *Bartell v. Lohiser*, 12 F.Supp.2d 640 (E.D.Mich.1998), found that qualified immunity would be appropriate for private foster care workers, it failed to address the first prong of the *Richardson* analysis. Furthermore, the decisions upon which it relied to suggest that qualified immunity was appropriate for private foster care workers predated *Richardson*. *See Bartell*, 12 F.Supp.2d at 646.

Public policy considerations do not favor conferring qualified immunity in the circumstances of this case. The McCloskey agency is subject to competitive market pressures, operating pursuant to a contract with the City. The agency therefore has an incentive not to be unduly timid in protecting the children under its care, but rather has an incentive to discharge its duties responsibly, so that the City will renew its contract. Thus a significant justification for qualified immunity, to insure responsible job performance by governmental employees, is not present in this case. *Cf. Richardson*, 117 S.Ct. at 2107 ("[M]arketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or 'non-arduous' employee job performance.").

In sum, the Court finds that the McCloskey agency is similar, albeit not identical, to the entity in *Richardson*, which was "a private firm, systematically organized to

assume a major lengthy administrative task . . . with limited direct supervision by the government, [which] undertakes that task . . . potentially in competition with others." *Richardson*, 117 S.Ct. at 2108. Accordingly, like the employees of the private firm in *Richardson*, the individual defendants in this case are not entitled to qualified immunity.[8] Accordingly, the Court denies defendants' motion for summary judgment as to plaintiff's claims against the individual defendants.

III. *Conclusion*

For the reasons set forth above, the Court grants in part and denies in part defendants' motion for summary judgment [doc. no. 33]. The Court's previous Opinion and Order of September 15, 1998 is hereby vacated solely as to the discussion of qualified immunity for individual defendants Marjorie McLoughlin and Barbara McMurray.

SO ORDERED.

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[8] This is not to say that the individual defendants are not entitled to a good faith defense, a question that *Richardson* declined to reach. *See Richardson*, 117 S.Ct. at 2108.

APPENDIX C

FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANNE B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York.

(Filed Nov. 1, 2000)

SYLVIA RODRIGUEZ, individually and on behalf of her minor child, Les Andrew Kelly,

Plaintiff-Appellee,

v.

MARJORIE MCLOUGHLIN, individually and as Executive Director of Cardinal McCloskey Children's & Family Services, and BARBARA MCMURRAY, individually and as Foster Boarding Home Director of Cardinal McCloskey Children's & Family Services, and CARDINAL MCCLOSKEY CHILDREN'S AND FAMILY SERVICES,

Defendants-Cross-Claimants-Appellants,

Docket Nos.:
99-7020(L),
99-7039(CON),
99-7089(CON)

NEW YORK CITY DEPT. OF SOCIAL SERVICES, NEW YORK CITY CHILD WELFARE ADMINISTRATION, and THE CITY OF NEW YORK,

Defendants-Cross-Defendants-Appellants.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Sylvia Rodriguez, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX D

NEW YORK TIMES **METRO** *FRIDAY, JUNE 9, 2000*

Ruling Limits Some Foster Parents' Rights

Issue Is Procedural Safeguards When Officials Remove Children

By Nina Bernstein

A judge's ruling that gave some foster parents the same rights as birth parents in cases where the authorities remove children from a home was struck down yesterday by a federal appeals court.

The original ruling, issued in September 1998, held that such foster parents have constitutional due-process rights to contest a removal promptly. It had been hailed by children's-rights lawyers as expanding the definition of a family and shielding children with no other parents from arbitrary removals from their long-term foster families. Lawyers for the city had argued that giving foster parents such rights could hamper child welfare workers trying to remove children from dangerous foster homes.

A three-judge panel of the United States Court of Appeals for the Second Circuit overturned the ruling.

In 1977, the United States Supreme Court chose not to resolve the question of whether there was a constitutionally protected right in the relationship of foster parent and child. In recent decisions, however, the Supreme Court has shown a willingness to say that significant relationships between children and people who are not their biological parents may deserve protection.

Lawyers for the plaintiffs said they would appeal the new ruling. Family-law experts said the case, which was decided on narrow grounds, could provide the Supreme Court with an opportunity to clarify its position on the broader and contentious issue of what rights arise from relationships in a changing array of family situations.

The case involves a 4-year-old boy who was about to be adopted by his foster mother but was abruptly removed from her home in the Bronx when a caseworker found him being watched only by a woman's 12-year-old learning-disabled son. The 4-year-old had been in her care since infancy, and his birth parents' rights had been terminated.

Nearly four months passed before the foster mother, Sylvia Rodriguez, was granted a hearing to contest the removal, and meanwhile, visits with the child, Andrew, were denied by the foster care agency, Cardinal McClosky Children's and Family Services. After a city investigation, the child was returned to her care, and she has since adopted him.

The earlier decision, by Judge Kimba M. Wood of Federal District Court in Manhattan, was a broad 50-page ruling extending constitutional protection. It held that although the removal was justifiable, under the circumstances, the foster mother and the child could sue the city for damages for violating her right to a prompt hearing and denying visits.

A federal jury subsequently awarded Ms. Rodriguez and Andrew $50,000 in damages, finding that the agency had shown "callous disregard" of their rights. The appellate court's ruling voids that award.

Family-law experts say the case may be heard by the Supreme Court.

Justice Amalya L. Kearse, who was joined by Ralph K. Winter and Norman A. Mordue, the panel called the handling of Ms. Rodriguez's case by the foster care agency "a judgmental error," but held that Ms. Rodriguez was not entitled to sue because under her adoption agreement – as in all other city-supervised cases – legal custody would not shift to the parent until the adoption was final.

Ms. Rodriguez cited a state regulation that includes in the definition of an adoptive parent "a person with whom a child has been placed for adoption." The regulation requires that "efforts to remove a child from the care and custody of his biological parent, adoptive parent, or legal guardian" shall be made only when it is in the child's best interest.

But the appeals court held that though Ms. Rodriguez fell within the statute's definition, it did not apply to her and Andrew, since she did not yet have legal custody.

The ruling potentially affects thousands of children and foster parents. According to city figures, of 34,099 children in New York City foster care in April, 2,875 were legally free for adoption and in a pre-adoptive home with a signed agreement – the category encompassed by Judge Wood's original ruling. An additional 2,201 children have had their parent's rights legally terminated but are not

yet in pre-adoptive homes, and 13,500 have the goal of adoption.

Jonathan M. Sobel, a lawyer with Chadbourne & Parke, which is representing Ms. Rodriguez and Andrew, said that if the decision stood, it would nullify the statute's effort to protect children from the arbitrary breakup of relationships that often have the same emotional strength as biological bonds.

Nicholas Scoppetta, commissioner of the city's Administration for Children's Services, noted that the administration itself had criticized the contract agency's handling of the case, especially the denial of visits. "There's an emotional tie, there's a relationship," he said.

But Mr. Scoppetta said the court was correct in holding that constitutional protections did not apply because "her investment in the child, her development of emotional ties, all began as a partnership with the state." The court, he added, properly distinguished between the rights of a parent, who is entitled to a hearing within 24 hours of an emergency removal, and the rights of "someone who is potentially a parent."

Leonard Koerner, chief of appeals for the City Law Department, said the city wanted to overturn the 1998 ruling in part because of the potential for financial liability.

"You don't want the agency to worry about damages every time they want to remove a child," he said.

But Martin Guggenheim, a professor of law at New York University, said the core issue was the child's right

to due process review, considering his best interests before the state disrupted such an important relationship.

In its last word directly on the issue, in 1977, the Supreme Court noted that "at least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions as the natural family."

APPENDIX E

U.S. Department of Health and Human Services,
Administration for Children and Families,
Administration on Children, Youth and Families,
Children's Bureau, www.acf.dhhs.gov/programs/cb

THE AFCARS REPORT

Current Estimates as of October 2000 (4)

How many children were in foster care on September 30, 1999? 568,000

SOURCE: Adoption and Foster Care Analysis and Reporting System (AFCARS) data submitted for the reporting period 4/1/99 through 9/30/99 (a six-month period).

NOTES: The number of jurisdictions submitting useable foster care data was 45 including the District of Columbia and Puerto Rico. If a State did not submit data for this reporting period, the total from the most recent submission to AFCARS was used to develop national estimates. Although the percentage distributions within questions have remained relatively constant since the first report (TAR 1), there is considerable variation in the estimated numbers. This is due in part to improvements in the quality of the data and to the use of different estimation procedures. TAR 1 developed estimates using a combination of data from AFCARS and its predecessor the Voluntary Cooperative Information System. In addition, the estimates in this report (TAR 4) include information on events that occurred during this reporting period but were not reported to AFCARS until the next reporting period. If the same adjustment is made to the number of children in care reported in a previous report (TAR 2) the

number of children in care on March 31, 1999 would be 578,000 instead of 547,000. The difference between the revised estimate for March 31, 1999 and September 30, 1999 estimate can be substantially accounted for by the high rates of discharges of children from foster care in the summer months. Some percentages do not add up to 100% and/or the estimated numbers do not add up to the total number in the category due to rounding.

* * *

What were the placement settings of children in foster care? [Emphasis added.]

Pre-Adoptive Home	3%	19,463
Foster Family Home (Relative)	26%	150,487
Foster Family Home (Non-Relative)	48%	272,036
Group Home	8%	43,537
Institution	9%	53,534
Supervised Independent Living	1%	4,946
Runaway	1%	7,630
Trial Home Visit	3%	16,368

What were the case goals of the children in foster care? [Emphasis added.]

Reunify with Parent(s) or Principal Caretaker(s)	42%	239,090
Live with Other Relative(s)	4%	22,899
Adoption	19%	105,705
Long Term Foster Care	7%	41,123

Emancipation	5%	30,197
Guardianship	4%	22,739
Case Plan Goal Not Yet Established	19%	106,246

* * *

How many children were waiting to be adopted on September 30, 1999? 118,000

NOTES: Waiting children are identified as children who have a goal of adoption and/or whose parental rights have been terminated. Children 16 years old and older whose parental rights have been terminated and who have a goal of emancipation have been excluded from the estimate.

* * *

How many children in foster care had their parental rights terminated for all living parents? 46,000

* * *

How many children were adopted from the public foster care system in FY1999? 46,000

SOURCE: Adoptions finalized in federal fiscal year 1999, reported to AFCARS by May 15, 2000.

NOTES: The number of jurisdictions reporting useable data was 52 including the District of Columbia and Puerto Rico. The federal fiscal year runs from October 1, 1998 through September 30, 1999. Some percentages do not add up to 100% and/or the estimated numbers do not add up to the total number in the category due to rounding.

* * *

What was the relationship of the adoptive parents to the child prior to the adoption?

Non-Relative	20%	9,148
Foster Parent	64%	29,389
Step-Parent	0%	90
Other Relative	16%	7,372

NOTE: Relatives who were also foster parents were counted as relatives.

Supreme Court, U.S.
FILED
APR 25 2001
CLERK

(2)

No. 00-1314

IN THE

Supreme Court of the United States

Sylvia Rodriguez, Individually And On Behalf Of Her Minor Child, Les Andrew Kelly,

Petitioner,

v.

Marjorie McLoughlin, Individually And As Executive Director Of Cardinal McCloskey Children's And Family Services, Barbara McMurray, Individually And As Foster Boarding Home Director Of Cardinal McCloskey Children's And Family Services, Cardinal McCloskey Children's And Family Services, New York City Department Social Services, New York City Child Welfare Administration, And The City Of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief In Opposition For Respondents Marjorie McLoughlin, Barbara McMurray and Cardinal McCloskey Children's And Family Services

MICHAEL P. CAPRIANO
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QUESTIONS PRESENTED

Whether a foster mother and foster child develop a constitutional liberty interest similar to that of natural or adoptive families, prior to lawful adoption, based upon emotional attachment, and where a contract vests custody of the child with a foster care agency until the day of legal adoption; and where in fact, an emergency removal, which was held to be justified, was carried out after the foster mother left two foster children in the home unsupervised by any adult for more than two hours, in violation of the applicable rules and regulations.

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STATUTES OR OTHER PROVISIONS INVOLVED

It is respectfully submitted as this lawsuit involves a so-called "emergency removal", many, if not most, of the New York State statutes cited in petitioner's *certiorari* petition are not directly relevant. Rather, co-respondent respectfully suggests that N.Y. Comp. Codes R. & Regs. tit. 18 § 444.5(c)(3) is of greater relevance. This provision provides that foster children under 10 years must never be left without adult supervision.

Additionally, relevant is the New York State Social Services Law § 383(2) which states:

> The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.

Additionally, New York Social Services Law § 386 supports the right of the inspection of the foster home and periodic visitation of the foster child by the agency (McCloskey). Social Services Law § 400 specifically authorizes the removal of children from a foster home by the authorized agent of the state. The scope of authority and responsibility vested with foster agencies in New York is illustrated by Social Services Law § 398(9), which authorizes a social services official to conduct an emergency removal of a child from his *natural* or *adoptive* home if the child is endangered.

PRELIMINARY STATEMENT

This brief is respectfully submitted in opposition to the plaintiff-petitioner's petition for a writ of *certiorari* on behalf of defendants-respondents MARJORIE McLOUGHLIN, individually and as Executive Director of Cardinal McCloskey Children's and Family Services, BARBARA McMURRAY, individually and as Foster Boarding Home Director of Cardinal McCloskey Children's and Family Services, and CARDINAL McCLOSKEY CHILDREN'S AND FAMILY SERVICES (hereinafter "co-respondents").

Respondents respectfully suggest that the decision below, by the United States Court of Appeals for the Second Circuit, was correctly decided, and petitioner's application should be denied. The decision below correctly found that the City and its authorized agency have ultimate responsibility for critical child care decisions and that an extension of a constitutional liberty interest between Sylvia Rodriguez and Andrew was not warranted.

ISSUES PRESENTED

This Court is called upon by petitioner to overturn the well-reasoned decision of the United States Court of Appeals, Second Circuit, which held that plaintiff-petitioner did not have a constitutionally protected "liberty interest" prior to the time when the foster parent became endowed with the full parental rights of an adoptive parent. Attempting to elevate the liberty interest of pre-adoptive foster families, petitioner ignores the "contract care provider" nature of the relationship between foster parents and foster children in New York. Petitioner further misconstrues New York State statutes in suggesting that they independently create a constitutionally

protected "liberty interest". Petitioner's viewpoint collides with the proper authority of the actual legal guardian of a child during the foster care process, in making decisions in the best interest of the child. In doing so, petitioner would carve an awkward exception to well-settled constitutional law by placing an overlay of ill-defined federal requirements over state law requirements that have already been found constitutional by the Supreme Court in *Smith v. Organization of Foster Families For Equality & Reform*, 431 U.S. 816, 97 S. Ct. 2094 (1977) (hereinafter "*OFFER*").

Finally, it is respectfully submitted that petitioner's arguments that the Second Circuit opinion has a "wide ranging social impact", (see petition, p. 8) and that it conflicts with other decisions of the Supreme Court and of other circuits, are similarly misplaced.

STATEMENT OF FACTS

Les Andrew Kelly ("Andrew"), was born on March 15, 1990. His mother abandoned him in the hospital. He was taken into foster care by the City of New York and, through Cardinal McClorkey Children's and Family Services, placed in Sylvia Rodriguez' home when he was thirteen days old. He remained there until the events giving rise to this lawsuit. In June 1993, the parental rights of Andrew's biological mother were terminated by the New York Family Court, and Andrew's guardianship and custody were transferred to the Commissioner of Social Services of the City of New York and McCloskey, as an authorized agent.

In August 1993, Sylvia Rodriguez and McCloskey executed an "Adoptive Placement Agreement". In that agreement Sylvia Rodriguez acknowledged the following:

> • [I am] taking this child with the intention of adoption although [I] understand that legal custody remains with Cardinal McCloskey and that this adoptive placement agreement remains in effect until the date of legal adoption.
>
> • The legal adoption will take place after both Cardinal McCloskey and [I] agree that it is in the child's best interest.

Sylvia Rodriguez also agreed that

> • If at any time prior to legal adoption it is determined by the agency or by [me] that the child should be removed from [my] home, [I] will cooperate with the agency in carrying this out in a way that serves the best interest of the child in the judgment of the agency.

Petitioner represents that "by March 1994 [the month of Andrew's removal] all adoption papers had been filed for Andrew's adoption, and the City, CWA, the foster care agency in Ms. Rodriguez were all awaiting the finalization of the adoption process". In fact, the unrebutted trial testimony revealed that the subsidy necessary for adoption had not yet been processed, and it was premature to even retain an attorney to finalize the application to the court for legal adoption. Thus, plaintiff/ petitioner's claim that all the "paperwork" had been filed is misleading. The adoption was not finalized for approximately a year after the foster mother and child were reunited in June of 1994.

On March 18, 1994, respondent McCloskey, as an authorized agent for the City of New York removed two foster

children in its charge, including Andrew, from the foster home of petitioner Sylvia Rodriguez . The removal was made based on unrebutted facts that Sylvia Rodriguez had left the two foster care infants (aged three and four years), solely in the care of Ms. Rodriguez' emotionally handicapped twelve-year-old grandson for a period of at least two hours during which no adult was present to supervise the children. Sylvia Rodriguez thus violated 18 N.Y.C.R.R., § 444.5(c)(3), which provides that a foster parent is "never [to] leave children under the age of 10 years alone without competent adult supervision". The removal caused an inexorable sequence of events mandated by the state and city regulatory schemes and designed to ensure the safety of foster children following incidents of suspected neglect. The emergency removal of the foster infants by McCloskey social worker was found proper and lawful by the trial court below.[1]

At trial, there was unrebutted evidence that on the actual day of the removal, Sylvia Rodriguez was notified by respondent Barbara McMurray via telephone about the removal. The unrebutted trial evidence also showed that Ms. Rodriguez first contacted an attorney to help her with this matter one week after the removal, and made an application for a hearing within two weeks of the emergency removal.

Following the emergency removal Ms. Rodriguez successfully pursued her remedy to return Andrew.

1. There is an important distinction between a planned removal of a foster child and an emergency removal like the one at issue in this case. A planned removal has requirements for pre-removal notice, a possible pre-removal investigation, and possible pre-removal hearing. An emergency removal, due to its urgency, has no pre-action requirement under state law and by necessity the investigation and any hearing come after the removal.

The second foster child, Thomas Green, was not preferred for adoption and remained in another foster home where he was eventually adopted. The petitioners were reunited on or about July 13, 1994 and Ms. Rodriguez pursued adoption which was finalized a year later. Thereafter, this suit was commenced.

Originally, respondents had moved pursuant to Rule 12(b)(6) to dismiss. Magistrate Ronald L. Ellis recommended that the motion to dismiss be granted. Petitioner objected and the district court held that there was a liberty interest which had been violated by respondents. The case then went to trial on the issue of damages only, as the district court had essentially made a liability finding. The second circuit reversed.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

It is respectfully suggested that petitioner in this action does not have a constitutionally protected liberty interest prior to actual adoption. Moreover, the Second Circuit opinion is not in conflict with the "*OFFER*" decision. Nor does the Second Circuit opinion conflict with Supreme Court precedent, or with decisions of other lower courts in a manner which mandates this Court granting *certiorari*.

Petitioner claims (at p.7 of the petition) that the opinion below establishes "that every foster family in New York must live in fear that it may be torn apart and denied a timely and meaningful opportunity to contest that involuntary separation". In fact, the trial court expressly found that the

agency acted in the best interest of the children by removing them from the home after they had been left unsupervised by any adult for more than two hours[2].

The *OFFER* Decision

In *OFFER*, foster parents who felt they had a vested interest in their foster children because they had lived together a year or more brought a lawsuit based on 42 U.S.C. § 1983. 431 U.S. at 818-19, 97 S. Ct. at 2096-97. The suit challenged the constitutionality of the New York regulatory scheme that allowed for removal of foster children at the discretion of foster care agencies. *Id.* In a decision delivered by Justice Brennan, the Court surveyed the very statutes at issue in this case regarding the authority to remove foster children, and the applicable notice requirements, and found them constitutionally sound. 431 U.S. at 818-38, 97 S. Ct. at 2097-2106.

The Court noted that any call for reform of the foster care system was properly directed to the Legislature, and that the emotional ties so vigorously asserted were actually derived in the first instance from the impersonal source of state law and binding contractual arrangements. 431 U.S. at

2. Petitioner somewhat disingenuously states in the petition (at p.6) that "Ms. Rodriguez did not contest the validity of the removal at trial or on appeal" In fact, petitioner's original complaint alleged that the removal was improper, which the trial court completely rejected. Petitioner in fact did not appeal from that pre-trial determination. Additionally, petitioner makes no mention of the fact that a second child, also under the age of five, was removed at the same time as Les Andrew Kelly. That child was not adopted by Sylvia Rodriguez. It would appear that any "emotional attachment" that arose with respect to that other child (also residing with the foster mother since shortly after birth) was of less consequence to petitioner.

838, 845, 97 S. Ct. at 2106, 2110. In a holding that has guided bench and bar alike, the Court emphasized that the expectations of entitlement of foster parents depended on governing state law. 431 U.S. at 845-6, 97 S. Ct. at 2210. The Court held: "In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty' in the foster family." 431 U.S. at 846, 97 S. Ct. at 2110.

The holdings, express and implied, that are signaled by *OFFER* have been interpreted by lower courts with convincing uniformity: the rights of foster parents are severely limited and should not hamstring the governing state and municipal authorities in the exercise of their guardian role. Express language within the concurring opinion of *OFFER* is clear on the subject. Justice Stewart, writing the concurring opinion joined by Justices Burger and Rehnquist, stated: "I would squarely hold that the interests asserted by the appellees are not a kind that the Due Process Clause of the Fourteenth Amendment protects." 431 U.S. at 857-8, 97 S. Ct. at 2116-17.

Petitioner incorrectly suggests that by virtue of the fact that the statement cited above is contained in the concurring opinion, a majority of the Court held for the reverse proposition, namely, that pre-adoptive foster parents had broad Due Process constitutional rights. A reading of *OFFER*, however, does not bear this interpretation out.

Decisions After *OFFER*

Numerous courts since *OFFER* provide a majority view that there is no substantial liberty interest between foster parent and foster child. Following the Fifth Circuit decision in *Drummond v. Fulton County Dept. of Family*, 563 F.2d 1200 (5th Cir. 1977), *cert. den'd*, 437 U.S. 910 (1978), which was decided shortly after *OFFER*, a dozen courts have ruled consistent with the verbatim language of the concurring opinion in *OFFER* that is no substantial liberty interest in a foster family scenario. As the Fifth Circuit held in *Drummond:*

> True liberty rights do not flow from state law, which can be repealed by action of the legislature . . . The very fact that the relationship before us is a creature of state law . . . demonstrates that it is not a protected liberty interest, but an interest limited by the very laws which create it.

Drummond, 563 F.2d at 1207

The holding that there is no constitutionally protected liberty interest invested in foster families has been repeated in numerous circuits. *See Wildauer v. Frederick County*, 993 F. 2d 369, 373 (4th Cir. 1993) (no constitutionally protected liberty interest in favor of foster parent without custody of foster child); *Renfro v. Cuyahoga County Dept. of Human Services*, 884 F.2d 943, 944 (6th Cir. 1989) (no due process liberty interest, right of appeal, or right of to written explanation arising under Ohio law following removal of foster child after six year residence with foster family); *Sherrard v. Owens*, 644 F.2d 542, 543 (6th Cir. 1981),

cert. den'd, 454 U.S. 828, 102 S. Ct. 120 (1981) (no constitutionally protected liberty interest in foster family relationship); *Kyess v. County Dept. of Public Welfare of Tippecanoe County*, 600 F.2d 693, 694 (7th Cir. 1979) (no constitutional liberty interest after substantial period of foster care placement – Indiana law examined); *Backlund v. Barnhart*, 778 F.2d 1386, 1389-90 (9th Cir. 1985) (no recognized liberty or property interest in foster child – Washington law examined); *Spielman v. Hildebrand*, 873 F.2d 1377, 1384-85 (10th Cir. 1989) (liberty interest between unrelated parents and children limited by state law giving rise to that relationship). Other courts have reached the same conclusion: *Dewees v. Stevenson*, 779 F. Supp. 25 (E.D. Pa. 1991); *Engstrom v. State*, 461 N.W.2d 309, 318-319 (Iowa 1990).

Petitioner cites the *Brown* case; this case was specifically based on the California regulatory structure. *Brown v. County of San Joaquin*, 601 F. Supp. 653 (E.D. Cal. 1985) In fact, two higher court decisions by the Ninth Circuit encompassing California support the opposite conclusion: that there is no substantial liberty interest between foster parents and foster children. See *Backlund*, 778 F. 2d at 1386; *Gibson v. Merced County Dept. of Human Resources*, 799 F. 2d 582 (9th Cir. 1986). The fact that *Backlund* deals with the Washington State statutory scheme underscores the fact that an evaluation of the California scheme is not relevant to the issues presently before the Court that depend necessarily on New York law. *See OFFER*, 431 U.S. at 846-47, 97 S. Ct. at 2110.

The New York State Court cases cited by petitioner ignore the United State Supreme Court's ruling in *OFFER* that any due process rights arising out of state law are limited and to be strictly construed. By contrast, expansive

definitions of "family" in interpreting, for example, rent stabilization laws (included in the cases cited by petitioner) have no precedential value in the context of this action. Thus, cases such as *Braschi v. Stahl Associates, Co.*, 74 N.Y. 2d 201, 544 N.Y.S. 2d 784 (Ct. App. 1989)[4] cited by petitioner are not applicable.

Petitioner argues that a starting point for determining whether a liberty interest exist is whether a foster family is "sufficiently like a natural family". This ignores the clear mandates of *OFFER*. Significantly, this approach also ignores that Ms. Rodriguez' "family" included another child, also under the age of five, living in this house since shortly after birth, but who Ms. Rodriguez elected not to adopt. Additionally, petitioner ignores the contractual nature of the foster care relationship.

Petitioner claims that the Second Circuit's opinion in Rodriguez is in direct conflict with the Third Circuit in *McLoughlin v. Perinskey* 693 F. Supp. 318 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3d Cir. 1989). A close reading of *McLoughlin*, in fact, suggests the opposite. *McLoughlin* dealt with an improper removal. The relevant Pennsylvania state statute in *McLoughlin* explicitly mandated that foster parents shall be notified in writing of their right to appeal at least 15 days *prior* to the relocation of the child. Furthermore, should the foster parent file said appeal, Pennsylvania statutes mandate that "the child must remain in the foster family home pending a decision on the appeal". *McLoughlin* 693 F. Supp. at 326. The foster child at issue in *McLoughlin* was removed

4. *Braschi* held that "since rent control laws are remedial in nature and designed to promote the public good, their provision should be interpreted broadly to effectuate their purpose" *Braschi*, 544 N.Y.S. 2d at 787.

without any prior notice or opportunity for the foster parents to file an appeal which would stay any removal of the child. By contrast, in this action, the propriety of the removal is simply not an issue. Nor do the relevant New York State statutes contain explicit, mandatory and relevant dictates that were violated.[5]

The Tenth Circuit case of *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1989) also does not support plaintiff's position. *Spielman*, like *McLaughlin*, dealt with an improper removal. The Tenth Circuit in *Spielman* specifically did not decide if the pre-adoptive status of the relationship at issue was a sufficient liberty interest to afford some level of due process protection. Rather, the court held that as the plaintiff received a hearing, any such constitutional right, if it existed, was not violated by defendant's conduct. *Spielman*, 873 F.2d at 1385.

Petitioners also rely upon the holding in *Thelan v. Catholic Social Services*, 691 F. Supp. 1179 (E.D. Wis. 1988). Petitioners failed to note the actual holding of *Thelan*, in which the court specifically held that the pre-adoptive plaintiffs had no constitutional entitlement to a pre-removal hearing. *Thelan*, 691 F. Supp. at 1180. The *Thelan* court decided the case on this "narrow issue" and expressly stated that no determination is made as to the merits of the other issues raised. *Id*, at 1180, 1182. Furthermore, the approach taken by the *Thelan* court tempers any liberty interest created by a foster parent's expectation of permanency with the all important relevant state statutes. The court specifically found

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5. It should be noted additionally that the relevant issue in *McLoughlin* was decided by the district court and not addressed by the appellate court.

in *Thelan* that any constitutionally protected liberty interest does not exceed the interest established by Wisconsin State Law. *Id.* at 1185.

Petitioner's Reliance Upon Statutes and Regulations

It is respectfully submitted that petitioner's reliance upon various upon New York State statutes and regulations which, they claim, mandates a so-called "liberty" interest, is misplaced. As discussed by the Second Circuit opinion below, *OFFER* and other cases dictate that "liberty interests" created solely by application of state law are narrow, limited, and context-specific. As held in *Kentucky Department of Correction v. Thompson*, 490 U.S. 454, 109 S. Ct. 1904 (1989). "The most common manner in which a state creates a liberty interest is by establishing substantive predicates to govern official decisionmaking. . . and further, by mandating the outcome to be reached upon a finding that a relevant criteria have been met". *Id.* at 490 U.S. at 462. Additionally, to create a liberty interest, a statute or regulation must "contain explicitly mandatory language, i.e. specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow" *Id.* at 490 U.S. at 463.

Importantly, the Court pointed out that the search for specific substantive directives to the decisionmaker must be context-specific.

> It should be obvious that the mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found. The search is for *relevant* mandatory

> language that expressly requires the decisionmaker to apply whether [the plaintiff] may be deprived of the particular interest in question.

Kentucky Department of Corrections v. Thompson, 490 U.S. at 464 n.4 (emphases in original).

Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293 (1995) provides further guidance, insofar as the Court recognized that the relevant constitutional interpretation must be grounded in common sense. "Our decision today only abandons an approach that in practice is difficult to administer which produces anomalous results." *Sandin*, 515 U.S. at 483, n.5. As discussed by the Second Circuit, below, *Sandin* does not disturb the principle stated in *Kentucky Dept. of Corrections v. Thompson* that no "liberty interest" has been created by state law where there is no explicit mandatory language.

With the above in mind, petitioner's efforts to transmute the statutes cited into a "liberty interest" in this specific action must fail. None of these provisions contains the type of *relevant* language that mandates specific defined conduct which would give rise to a liberty interest. Petitioner cites claimed "mandatory language" in two provisions. First, they cite to section 421.2(b) in that efforts to remove a child shall be undertaken only when it is clearly established that such action is in the child's best interest. Second, petitioner claims "mandatory language" in the provision of section 383-c(9), which provides that a foster parent who has had continuous care of a child for more than twelve months shall be entitled to intervene in any proceeding involving the child.

The first provision deals exclusively with a removal, the propriety of which is not an issue here. (The district court specifically declined to second guess McCloskey's decision to remove the two children when they were left without proper adult supervision, and the decision was not contested by petitioners.) Agencies such as McCloskey have unfettered authority to remove foster children in emergency situations and are given authority to do so without advance notice to the foster parents. See N.Y. Soc. Serv. Law § 383(2); N.Y. Comp. Codes R. & Regs. tit. 18 § 443.5(a). Furthermore, failure by the agency to intervene in such an emergency situation, would subject the children to risk of potential harm and potentially violate the infant's due process rights, and subject the agency to a lawsuit for failing to safeguard the infants.[6]

The second example claimed as "mandatory language" pertains to intervention by a foster parent. Clearly, intervention during the actual physical removal would be inappropriate, would frustrate the very purpose of a removal, and is inapplicable in this case.[7] Post-removal, there is no question that Sylvia Rodriguez, in fact, did intervene with request to one of the two children and ended up legally adopting this child. Thus, the provision cited by petitioner cannot independently generate a "liberty interest" in this case.

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6. An Illinois District Court has held that a foster infant has a due process right to be free from placement in a foster care environment where the necessary degree of supervision is lacking. *Taahira W. by McCord-Sally v. Travis*, 908 F. Supp. 533 (N.D. Ill. 1995).

7. The petition, in fact, states at page 6 that "Ms. Rodriguez did not contest the validity of the removal at trial or on appeal".

Petitioner criticizes the decision below for failing to hold that § 421.2(b) gives rise to a liberty interest (see Petition p. 24). In addition to the rationale as set forth in the decision below, two other points deserve mention. First, the cited regulation deals solely with removal, which in this action was held to be proper. It does not deal with continued visitation or return after a hearing. Second, the language of the statute does not set forth a specific, mandatory course of action which was then violated, but rather is a vague general provision dealing with the best interest of the child. A simple "best interest of the child" reference in the statutes cannot, by itself, form the predicate for a "liberty interest" derived from state law.

Other rules and regulations cited by petitioner are simply not relevant to the issues in this action. By contrast, should petitioner's approach to the creation of a "liberty" interest be followed (based upon the vague or inapplicable regulations cited) then virtually every foster parent in the State of New York would have a liberty interest, a result clearly not in accord with either *OFFER* or common sense.

Petitioner urges that the lower court opinion in the case is the "death knell" to any and all due process liberty interests for foster care families. (See Petition p.7). Nothing in the lower court's opinion indicates such a sweeping result. Rather, using the approach suggested by petitioner, virtually every foster care family would be able to claim some sort of "liberty interest" based upon the statutes cited by petitioner. Statutes establishing procedural requirements, for example, to intervene in a custody proceeding, are far removed from the specific facts in this action. Yet if these statutes are

allowed to create a "liberty interest" in this case any intelligent administration of the foster care system will be thrown into complete chaos.[8]

The Example of Thomas Green Reveals that Petitioner Advocates for an Unworkable Standard

Historically, foster families have not enjoyed the liberty interest urged. What Petitioner seeks from this Court is to carve an exception in the case law and settled precedents. In order to propose that the Rodriguez family has an enhanced liberty interest relative to another foster family in New York, petitioners argue that certain factors in their family circumstance set Andrew apart from other foster children. (See Petition at i, ii). Each of the factors that petitioners offer is based upon an expectation that temporary foster care placement will become permanent once lawful adoption is completed. Although all may aspire toward adoption, none of these factors promise future adoption, and in many foster care homes the expectation of adoption fails to culminate in lawful adoption. Petitioners argue that certain foster families should have a liberty interest like that of adoptive families because the foster families hold the strands of what may lead to adoption in the future. But it cannot follow that all foster homes with same factors as the Rodriguez home deserve an enhanced liberty interest. The particular circumstances in each home differ, despite petitioner's efforts to present the characteristics as uniform.

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8. Although this case does not create the problem of the so-called "collision of rights" between a natural parent and an adoptive parent, a decision in petitioner's favor would create that very collision in a huge number of cases in which the natural parent, an agency, and a foster parent all were held to have some type of liberty interest.

Thomas Green is the most obvious and striking example of a foster child who lacks a liberty interest but still shares the characteristics found in the Rodriguez/Kelly home situation. Thomas Green also had been a foster child in Sylvia Rodriguez's house since shortly after his birth. As trial testimony showed, Thomas Green's adoption by Sylvia Rodriguez was arranged and the path for adoption was cleared by the termination of the natural parent's rights. He lived in the Rodriguez home well in excess of the minimum required 12 months. He lived like a foster sibling to Les Andrew Kelly for almost all of his life until both children were removed from the Rodriguez foster home on March 18, 1994. The removal of Thomas Green and Andrew was conducted by the same agency personnel, and for the same reasons. The distinction between Thomas Green and Andrew is that ultimately Sylvia Rodriguez did not prefer Thomas Green for adoption. After the removal of both foster children, Ms. Rodriguez pressed for the return of Andrew, but declined to pursue the return of Thomas Green (Thomas Green was removed to another foster home and was subsequently adopted there).

The petition makes no mention of Thomas Green, but his example shows the practical unworkablility of Petitioner's arguments. Thomas Green's family situation with Sylvia Rodriguez on March 18, 1994 had the same factors that petitioner urges must give rise to a liberty interest for Andrew. Thomas Green reveals a fundamental disjunct in petitioner's argument that translates into an impossible standard for field workers, who must identify which foster children in the New York system enjoy a liberty interest and which do not. Petitioners argument would require Venton Montplaisir (the Agency worker who conducted the removal on March 18, 1994) to make an on-site calculation of the difference

between the rights of Les Andrew Kelly and those of Thomas Green. It is respectfully submitted that this standard is not only unwieldy, but unworkable.

Petitioner's Arguments Regarding Andrew's "Independent Liberty Interest" are without Merit

Petitioner claims that the decision below failed to consider Andrew's own liberty interest, as distinct from that of Ms. Rodriguez. Petitioner states, to that end, that "Andrew's interest in maintaining the integrity and familial relationship, and the effect on him in an abrupt separation from the only family he has ever known, is no less powerful because of his lack of a biological tie with Ms. Rodriguez."

Petitioner cites no valid authority for the proposition that this equitable argument by itself, creates a constitutionally protected liberty interest. Additionally, petitioner overlooks the fact that another child, Thomas Green, was present in the Rodriguez household from birth or shortly thereafter and was also removed at the same time as Andrew. Surely petitioner does not mean to suggest that Thomas Green has a constitutional liberty interest, as Ms. Rodriguez made no efforts whatsoever to secure his return. Yet from the child's perspective (as is urged by petitioner) there is no difference between 4 year old Andrew and 3 year old Thomas Green.

Additionally, numerous Federal Courts have set out the limit of the constitution rights of foster children within the state foster care system. *See Lipscomb v. Simmons*, 962 F.2d 1374 (9th Cir. 1992); *K.H. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (no constitutional right to stable foster care environment); *Wendy H. v. City of Philadelphia*, 849 F. Supp. 367 (E.D. Penn. 1994).

Ultimate Responsibility for the Foster Child is Reposed with the City and the Agency

The Second Circuit decision places the ultimate responsibility for the safety and welfare of New York foster children exactly where it should be B with the legal guardians of the children. As the Petition notes at p.25, the Adoption Placement Agreement specifically memorialized that lawful custody of the foster child remained with the Agency until the completion of adoption (this custody requirement is also a matter of statute at N.Y. Soc. Serv. Law § 383(2)). As the statutes show, and as trial testimony explored, layers of government regulation and reporting requirements govern the foster care agency, but Ms. Rodriguez is beholden only to the terms of the placement agreement. If and when legal adoption occurs, then the foster children have a new legal guardian and the ultimate responsibility shifts to that new guardian.

Where New York law affords long-term foster parents with certain adoption preferences, basic fairness and sensible practicalities are served. Petitioner argues to extend the premise of long-term foster parent preference so that the foster parents gain a vote in the parenting decision that belongs with the lawful guardian. Petitioner alludes to "grievous wrongs" against foster children that may be made by the state and the agency in their determination of what is best for the foster child; these "wrongs" are actually differences of opinion between what the foster parent believes is best for the child and what the legal guardian believes is best.

Petitioners argue for a constitutional platform from which to advance their view of child care upon the lawful guardian. The basis of petitioner's argument is simply that family bonding that always accompanies the hope of an adoption prospect. When adoption is finalized then the adoptive parent has the ultimate responsibility for the child, which cannot be interfered with by the former guardians, the state and the agency. For the same sound reasons, and based on the same legal precedents, the Court should not allow the foster parent to claim early right of partial guardianship during an unfinished and undecided adoption process. The foster parent is not ultimately responsible for the child, but would be given leeway to hamstring the guardian in its exercise of discretion. Where the agency's authority to act is compromised, then that compromise comes at the risk of harm to the child.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court not grant *certiorari* in this matter.

Respectfully submitted,

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No. 00-1314

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In The
Supreme Court of the United States

SYLVIA RODRIGUEZ, individually and on behalf of her minor child, LES ANDREW KELLY,

Petitioners,

-against-

MARJORIE McLOUGHLIN, individually and as Executive Director Cardinal McCloskey Children's & Family Services, and BARBARA McMURRAY, individually and as Foster Boarding Home Director of Cardinal McCloskey Children's & Family Services, and CARDINAL McCLOSKEY CHILDREN'S AND FAMILY SERVICES, *et al.*,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION

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30pp

QUESTIONS PRESENTED

1. Does the Due Process Clause create a liberty interest in family integrity for a pre-adoptive foster family of unrelated individuals where the family was created, licensed, and funded by the government, and the government and its contract agency retained legal guardianship and custody until the child was adopted?

2. Does New York law create a liberty interest in family integrity for a pre-adoptive foster family of unrelated individuals where the statutes, regulations, and contract governing the relationship all make it evident that the child is in the legal custody and guardianship of the government and its contractor child-care agency, and the child may be removed from the home at any time prior to adoption if the legally responsible agencies consider removal to be in the best interests of the child?

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Statutes Pertaining to Children in Foster Care

N.Y. Soc. Serv. Law § 383(2)

The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.

N.Y. Soc. Serv. Law § 400(1)

When any child shall have been placed in an institution or in a family home by a social services official, the social services official may remove such child from such institution or family home and make such disposition of such child as is provided by law . . . .

Statute Pertaining to Status of Adopted Children

N.Y. Dom. Rel. Law § 117(1)(c)

The adoptive parents or parent and the adoptive child shall sustain toward each other the legal relation of parent and child and shall have all the rights and be subject to all the duties of that relation including the rights of inheritance from and through each other and the natural and adopted kindred of the adoptive parent or parents.

STATEMENT OF THE CASE

Andrew was born in 1990. His father was unknown, his mother abandoned him, and he was placed into the custody of the City of New York.[1] The City placed Andrew with one of its contractor agencies, respondent Cardinal McCloskey Children's & Family Services ("Cardinal McCloskey"), which arranged for Andrew to be cared for by a foster parent, petitioner Sylvia Rodriguez. In June 1993, the Family Court of the State of New York terminated Andrew's mother's parental rights and awarded legal guardianship and custody of Andrew to the City and Cardinal McCloskey (A-3).[2]

Planning for Andrew ultimately to be adopted by Rodriguez, Cardinal McCloskey and Rodriguez signed an "Adoptive Placement Agreement" stating the following:

> We are taking this child with the intention of adoption although we understand that legal

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[1] When Andrew was born, the Commissioner of Social Services of the City of New York was the official who assumed legal custody of children placed in foster care in New York City. The Commissioner is the head of respondents New York City Department of Social Services and New York City Child Welfare Administration, formerly a bureau within the City's Department of Social Services. Foster children in New York City are now placed into the custody of the Commissioner of the New York City Administration for Children's Services, a new agency. For ease of reference, the respondent City of New York and its agencies will be referred to collectively as "the City" or "municipal respondents."

[2] Numbers in parentheses preceded by an "A" refer to pages in the Appendix to the Petition for a Writ of Certiorari.

custody remains with Card. McCloskey and that this adoptive placement agreement remains in effect until the date of legal adoption.

The legal adoption will take place after both Card. McCloskey and we agree that it is in the child's best interest.

* * *

If at any time prior to legal adoption it is determined by the agency or by us that the child should be removed from our home, we will cooperate with the agency in carrying this out in a way that serves the best interest of the child in the judgement of the agency.

(A4) (quoting Adoptive Placement Agreement).

On March 18, 1994, when Andrew was four years old, a Cardinal McCloskey caseworker visited Rodriguez's home and found Andrew and a three-year-old foster child "tended only by Rodriguez's grandson Edwin Rodriguez . . ., a twelve-year-old emotionally handicapped, special-education student" (A5). Edwin "appeared to be overwhelmed" by his charges (A5). After waiting in the home for two hours, the caseworker called his office for instructions and was told to remove Andrew and Thomas (A6).

The absence of adult supervision for two foster children under ten years old violated State regulations, *see* N.Y. Comp. Codes R. & Regs. tit. 18, § 444.5(c)(3), and Cardinal McCloskey filed a child maltreatment report, which triggered a City

investigation (A6). In the meantime, Rodriguez asked the City to conduct "an independent review" of the removal and sought an administrative "fair hearing" from the State (A6). Rodriguez also sought to visit Andrew during the period of separation, but her request was denied except for a single visit held the day before the hearing.

By mid-April, the City's investigators had determined that Andrew should be returned and Rodriguez should receive training in child supervision (A6-7). Cardinal McCloskey disagreed and chose to await the City's "independent review" hearing (A7). The hearing was conducted in late June, and a decision directing Andrew's return was issued on July 11, 1994 (A7). He was returned two days later and eventually adopted.

Rodriguez filed suit in district court for herself and Andrew, claiming that the March 1994 removal, the denial of visitation without notice and a hearing, and the delay between the removal and the June 1994 hearing violated their procedural due process rights.

Respondents moved for summary judgment, arguing, *inter alia*, that as a pre-adoptive foster family, Rodriguez and Andrew had no liberty interests protected by the Constitution. The district court disagreed, ruling as a matter of law that the March 1994 removal was lawful, but that the subsequent denial of visitation without a hearing and the delay in holding a hearing to review the removal violated Rodriguez's and Andrew's constitutional rights (A8-14).

After a trial limited to damages, Rodriguez was awarded $20,000 compensatory and $10,000 punitive damages from Cardinal McCloskey and $10,000 compensatory damages from the City. Andrew was found to have suffered no damages. The jury awarded him $1 nominal damages and $10,000 punitive damages from Cardinal McCloskey plus $1 nominal damages from the City (A15).

Cardinal McCloskey and the City appealed. The court of appeals reversed the district court and dismissed the complaint, ruling that neither the Due Process Clause nor state law created a liberty interest in family integrity for Rodriguez and Andrew. The court of appeals said that this Court's opinion in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), "leads [the court] to the conclusion that any liberty interest arising in the preservation of a biologically unrelated foster family would arise, if at all, only under state law, and not under the Due Process Clause itself" (A19).

The court of appeals' analysis of state law relied largely on the principles stated in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989). The court of appeals said that "[t]o create a liberty interest, a statute or regulation must contain explicitly mandatory language, *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow" (A20) (internal quotations and citation omitted).

After reviewing the statutes and regulations under which petitioners claimed a state-created liberty interest, the court of appeals concluded that

> none of the statutory or regulatory sections called to our attention contains any substantive predicates or explicitly mandatory language giving directives to decisionmakers as to the cohabitation or visitation rights of a foster mother and child in the wake of an emergency removal of the child from the foster home. We cannot conclude that these provisions are sufficient to give plaintiffs the liberty interests they assert.

(A27).

REASONS WHY THE PETITION SHOULD BE DENIED

I. It Is Already Established that the Due Process Clause Does Not Create a Protected Liberty Interest in Family Integrity for Foster Families Composed of Unrelated Individuals Brought Together by a Government Agency that Retains Legal Custody and Guardianship of the Child.

The first question in a procedural due process case is "whether there exists a liberty or property interest which has been interfered with by the State." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). Such interests " 'may arise from two sources—the Due Process Clause itself and the laws of the States.' " *Id.* (quoting *Hewitt v. Helms*, 459 U.S. 460, 466).

It is well-settled that the Due Process Clause does not create a protected liberty interest in family integrity for unrelated individuals brought together

as a foster family by the government. Like petitioners here, the foster parents who commenced *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977) ("*OFFER*"), argued that the emotional attachments that often develop between foster parents and foster children generate a constitutionally protected liberty interest in remaining together. 431 U.S. at 839.

OFFER explained that constitutional protection for family integrity is based on substantially more that the emotional attachments that can form between children and their caretakers. "[T]he usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." *Id.* at 843. This constitutional protection for "family privacy" flows from our conception of "intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'" *Id.* at 845 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503).

Underscoring this point, *OFFER* cited the marital relationship as an example of a non-biological relationship that is given constitutional protection, calling it "[t]he basic foundation of the family in our society," *id.*, a relationship with roots " 'older than the Bill of Rights.'".*Id.* at 843 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486).

Contrasting foster care with these time-honored family relationships, *OFFER* noted

> important distinctions between the foster family and the natural family. First, unlike the

> earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements. . . . [W]hatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset.

OFFER, 431 U.S. at 845. After explaining this distinction, this Court turned its attention to whether any liberty interests were created by state law, *id.* at 846, a question it deemed unnecessary to resolve. *Id.* at 847. The court of appeals properly read this discussion as a recognition that the Due Process Clause does not create liberty interests of the kind asserted by petitioners here.

Petitioners make much of the fact that *OFFER* left open the possibility that there might be "a small liberty interest" (Pet. at 12), even for foster parents of children caring for children whose biological parents still had parental rights (*id.* at 10-12); however, it is apparent that the question considered unresolved was whether state law created a protected liberty interest.

Petitioners support their argument that the question of a Constitution-based liberty interest was left open by citing the opinion joined by three concurring Justices, who urged that the plaintiffs' assertion of a liberty interest should be rejected outright (Pet. at 12) (quoting *OFFER*, 431 U.S. at 857-58 (Stewart, J., concurring)). However, the

concurring opinion's concentration on New York's statutory scheme makes it evident that the issue viewed as left open was whether state law created a protectible liberty interest, not whether such an interest arose directly from the Due Process Clause. *OFFER*, 431 U.S. at 856-63 (Stewart, J., concurring).

OFFER is consistent with other decisions by this Court recognizing the biological roots of the constitutional protection for family relationships. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion), this Court invalidated a zoning restriction that prevented extended families from living together. The ordinance was distinguished from one previously upheld by this Court because of "the overriding factor" that the valid ordinance "affected only unrelated individuals," while East Cleveland's "slic[ed] deeply into the family itself," 431 U.S. at 498, by "select[ing] certain categories of relatives who may live together" and others who could not. *Id.* at 499. Like *OFFER*, *Moore* emphasized "that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503.

Reno v. Flores, 507 U.S. 292, 311 n.6 (1993), rejected an argument that Immigration and Naturalization Service procedures governing the release of detained juveniles to adult custodians could not make distinctions based on whether the proposed custodian was related to the detained child. "Acceptance of such a proposition would revolutionize much of our family law. Categorical distinctions between relatives and nonrelatives, and between relatives of varying degrees of affinity, have

always played a predominant role in determining child custody and in innumerable other aspects of domestic relations." *Id.*

Petitioners cite *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925), as "support[ing] the principle that family is not limited to biological families" because the statute invalidated in *Pierce* prohibited any person with control of a child from having the child educated in a private school (Pet. at 13).

Petitioners are not aided by *Pierce*. The private schools that commenced the suit complained that "the enactment conflicts with the rights of parents." 268 U.S. at 532 or of "parents and guardians." *Id.* at 533. This Court's holding was that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. Here, of course, Andrew was a ward of the City and Cardinal McCloskey when the events at issue occurred, not of petitioner Rodriguez.

Later decisions do not give *Pierce* the expansive interpretation urged by petitioners. *See, e.g., Lehr v. Robertson*, 463 U.S. 248, 257 (1983) ("the 'liberty' of parents to control the education of their children that was vindicated" in *Pierce*); *Moore*, 431 U.S. at 501 (plurality opinion) (citing *Pierce* as a case that addressed "traditional parental authority in matters of child rearing and education"); *Troxel v. Granville*, 120 S. Ct. 2054, 2060 (2000) (plurality opinion) (quoting *Pierce*'s holding that parents and guardians have certain rights flowing from their control over a child's life); *id.* at 2068 (Thomas, J., concurring)

(citing *Pierce* as "hold[ing] that parents have a fundamental constitutional right to rear their children").

Pierce said parents have certain rights as "a counterpart of the responsibilities they have assumed." *Lehr*, 463 U.S. at 257. *Pierce* did not recognize a constitutionally protected liberty interest for contracted caretakers who have neither a biological connection to a child nor legal guardianship. This emphasis on rights flowing from obligations is noteworthy here since petitioner Rodriguez actually had two foster children in her home, Andrew and three year-old Thomas, who was removed from the Rodriguez home with Andrew (A5-6). Thomas was never returned because petitioner Rodriguez decided she no longer wanted him (Ct. App. App. at A554-56), and neither law nor any sense of familial duty obliged Rodriguez to continue caring for that child.

Nor are petitioners aided by their citation of *Brown v. County of San Joaquin*, 601 F. Supp 653 (E.D. Cal. 1985); *Berhow v. Crow*, 423 So. 2d 371 (Fla Dist. Ct. App. 1982); or *James v. McLinden*, 341 F. Supp 1233 (D. Conn. 1969), as cases finding a "Due Process Clause-based liberty interest" in foster families (Pet. at 15).

Brown is irreconcilably at odds with this Court's precedents. Moreover, the existence of a constitutionally created liberty interest for foster families has been rejected by the Court of Appeals for the Ninth Circuit, the very court that reviews the decisions of the district court that issued *Brown*. In *Backlund v. Barnhart*, 778 F.2d 1386 (9th Cir. 1985),

the court agreed with the Court of Appeals for the Fifth Circuit that since the state creates the foster care relationship, it is a creature of legislation, not a relationship with a constitutionally derived liberty interest. 778 F.2d at 1389-90 (quoting *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1207 (5th Cir. 1977)). *Brown* alone was cited as a case opposed to that holding. *Id.* at 1390.

In *Berhow*, the dispositive fact was that the foster parents initially received custody from "the natural mother—not the state," 423 So. 2d at 373, and "were registered in [California] as [the child's] parents upon the consent of the natural mother." *Id.* at 372. The same is true for *James*, which emphasized the absence of state involvement in the relationship between the child and her caretaker, including the fact that the plaintiff "has fed and clothed [the child] from the subsistence money she received." *Id.*

These cases fall far short of holding that the Constitution creates a liberty interest in family integrity for foster parents like petitioner Rodriguez, who agreed to care for a ward of the state who was not related to her. This simply is not the historically rooted family relationship given protection by the Due Process Clause.

II. New York Law Does Not Create a Constitutionally Protected Liberty Interest in Family Integrity for Pre-Adoptive Foster Parents and Children. Until a Child Is Adopted, the Responsible Government Agency and Its Contract Agencies May Remove Any Child from His Foster Home Whenever a Removal Is in the Child's Best Interests, a Broad, Subjective Standard that Affords Substantial Discretion to the Agencies with Legal Responsibility for the Child.

The court of appeals correctly concluded that New York statutes and regulations do not give rise to any constitutionally protected liberty-interest for pre-adoptive foster care placements.

> Mere expectations do not necessarily give rise to a state-created liberty interest protected by the Due Process Clause. "[A] state creates a protected liberty interest by placing substantive limits on official discretion." *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 462 (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)). "[T]he most common manner in which a State creates a liberty interest is by establishing 'substantive predicates' to govern official decisionmaking . . . and further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 462 (quoting *Hewitt v. Helms*, 459 U.S. at 472 ("specified substantive predicates")). To create a liberty interest, a statute or regulation must "contain 'explicitly mandatory language,' *i.e.*, specific directives to the decisionmaker

> that if the regulations' substantive predicates are present, a particular outcome must follow." *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 463 (quoting *Hewitt v. Helms*, 459 U.S. at 472).

(A19-20).

In *Meachum v. Fano*, 427 U.S. 215, 226 (1976) this Court ruled that regulations governing transfers from one prison to another did not create a liberty interest because there was "no right" to stay in a particular place that was "defeasible only upon proof of specific acts of misconduct." Rather, the regulations indicated that transfers were "made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate." 427 U.S. at 225.

When the relevant New York laws are analyzed using these principles, it is apparent that they do not create any right for pre-adoptive foster families to remain intact. Three Justices concurring in the result in *OFFER* did review New York's statutes and reached precisely that conclusion.

> [T]he predicate for invoking the Due Process Clause—the existence of state-created liberty or property—was missing in *Meachum* just as it is missing here. New York confers no right on foster families to remain intact, defeasible only upon proof of specific acts or circumstances. As was true of prison transfers in *Meachum*, transfers in and out of foster families "are made for a variety of reasons and

> often involve no more than informed predictions as to what would best serve . . . the safety and welfare of the [child]." 427 U.S. at 225.
>
> Similarly, New York law provides no basis for a justifiable expectation on the part of foster families that their relationship will continue indefinitely. The District Court in this litigation recognized as much, noting that the typical foster-care contract gives the agency the right to recall the child "upon request," and commenting that the discretionary authority vested in the agency "is on its face incompatible with plaintiffs' claim of legal entitlement." 418 F. Supp. at 281. . . .
>
> This is not to say that under the law of New York foster children are the pawns of the State, who may be whisked from family to family at the whim of state officials. . . . But the protection that foster children have is simply the requirement of state law that decisions about their placement be determined in the light of their best interests. This requirement is not "liberty or property" protected by the Due Process Clause, and it confers no right or expectancy of any kind in the continuity of the relationship between foster parents and children.

OFFER, 431 U.S. at 859-61 (Stewart, J., concurring) (citations omitted) (brackets in original).

While *OFFER* involved foster care prior to termination of parental rights, not pre-adoptive placements, everything stated above applies with equal force to the discretion reposed in New York officials when deciding whether to remove a child from a pre-adoptive home.

When Andrew's natural mother's rights were terminated, his guardianship was given to the City and Cardinal McCloskey by the family court. He was still a foster child under New York law, and petitioner Rodriguez remained a foster parent. *See* N.Y. Soc. Serv. Law § 371(19). "The rights and obligations of foster parents are limited to those provided in the applicable statutes or pursuant to their contract with the placement agency." *In re Dina Michelle S.*, 653 N.Y.S.2d 677, 678 (App. Div. 1997).

Child-care agencies have broad discretion to remove children from foster homes. "The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority . . . in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded." N.Y. Soc. Serv. Law § 383(2). Thus, until adoption, "foster care 'custodians'" do not have "true custody." *Spence-Chapin Adoption Serv. v. Polk*, 274 N.E.2d 431, 434 (N.Y. 1971) (requiring foster parent to comply with agency decision to return to natural mother a child previously surrendered for adoption).

Ms. Rodriguez's adoption agreement with Cardinal McCloskey recognized that Andrew's "legal

custody" remained with Cardinal McCloskey until adoption and that the agency could remove the child; she agreed to cooperate with any such decision (A27). This was not a waiver of her procedural rights under state law to contest a removal, but it shows that Ms. Rodriguez had no expectation that she was somehow exempted from child-care agencies' statutory authority to make removals in the best interests of a child.

New York's courts protect agencies' statutory and contractual authority. In *In re Hasani B.*, 600 N.Y.S.2d 694 (App. Div. 1993), a state appellate court set aside a family court order (i) directing a local commissioner of social services to certify a child's legal guardian as a foster parent and (ii) restricting the commissioner's discretion to remove the child only to emergency situations. The court ruled that the petitioner could not be both a legal guardian and foster parent since "[a] legal guardian has exclusive control, custody and care of the children, as opposed to the status of a foster parent where the agency in foster care placement continues to exercise care, custody or guardianship of the children." 600 N.Y.S.2d at 697 (citation omitted). Similarly, the family court could not "eliminate[] respondent's statutory right to remove a child from a foster home (subject to certain procedural requirements) without prior court authorization." *Id.* at 698.

Petitioners' claim of a state-created liberty interest is heavily dependent on a host of statutes and regulations providing procedural rights to foster parents (Pet. at 1-5). The court of appeals carefully reviewed the statutes and regulations relied on by

petitioners and correctly concluded that "these sections [contain] no language providing substantive predicates for, or substantive limitations on, the exercise of official discretion with respect to matters of removal or visitation" (A25; A22-27).

Petitioners urge that the court of appeals misread a regulation, N.Y. Comp. Codes R. & Regs., tit. 18, § 421.2(b), that purportedly creates a liberty interest because it provides that removals of certain children from "the care and custody" of certain people should occur only "when it is clearly established that such action is in such child's best interest" (Pet. at 24-27). The court of appeals ruled that the regulation did not apply to pre-adoptive foster parents like petitioner Rodriguez because such foster parents do not have "custody" of a foster child, which remains with the child-care agencies until adoption (A26).

This ruling was correct, *see Spence-Chapin*, 274 N.E.2d at 434 (foster parents do not have "true custody"); *Hasani B.*, 600 N.Y.S.2d at 697, but not dispositive in any event. Even if the regulation did apply to petitioner, it does not create specific substantive predicates that channel the exercise of the discretion to remove a child from a particular home. Such decisions remain governed by the best interests of the child standard, which does not utilize the kind of specific substantive predicates that create liberty interests.

Far from creating rights and expectations for individuals that a given child is theirs to keep, New York law makes it plain that, subject to traditional protections for parental rights, agency decisions regarding child custody, planning, and adoption are

guided by the best interests of the child. This standard does not authorize a certain result only upon the occurrence of specified predicates. Rather, it mandates a wide-ranging, open-ended inquiry into the myriad of complex, subjective factors that should be considered when planning a child's future custody. Properly applied, the best interests standard is the antithesis of taking action upon the occurrence of a specific factual predicate. "The only absolute in the law governing custody of children is that there are no absolutes." *Friederwitzer v. Friederwitzer*, 432 N.E.2d 765, 767 (N.Y. 1982). When courts apply the best interests standard to determine custody, "there are policies designed not to bind the courts, but to guide them in determining what is in the best interests of the child." *Eschbach v. Eschbach*, 436 N.E.2d 1260, 1262 (N.Y. 1982).

The crucial factors are far from specific. "Primary among the circumstances to be considered in determining the best interests of the child are the ability to provide for the child's emotional and intellectual development, the quality of the home environment and the parental guidance provided." *Louise E.S. v. W. Stephen S.*, 477 N.E.2d 1091, 1092 (N.Y. 1985). While continuity is an important component of any best interests assessment, no statute, regulation, or contract assures pre-adoptive foster parents that they will continue as foster parents and ultimately adopt the child absent occurrence of specific substantive predicates. The City and Cardinal McCloskey had the responsibility as Andrew's guardians to weigh the numerous factors that go into a best interests determination and make the decision that seemed wisest. The fact that such an assessment would consider continuity

of care as a factor supporting the status quo does not mean that the state created a liberty interest in continuity.

Moreover, the outcome sought by petitioners would create a legal twilight zone where there is doubt about child-care agencies' ability to make other important decisions not involving custody, such as consenting to needed medical care. As legal guardians, agencies are often called upon to make such judgments, and this ruling raises the prospect that pre-adoptive foster parents asserting parent-type liberty interests will claim some right to control or participate in that process. This outcome is both undesirable and plainly not intended by New York law. *See Hasani B.*, 600 N.Y.S.2d at 698 (criticizing order allowing caretaker to be both foster parent and legal guardian because it "raises the possibility of a clash between the authority of petitioner as legal guardian and the statutory responsibility of the [agency]").

Nor is there any conflict between the court of appeals' ruling here and those of other circuits. The erroneous constitutional holdings of the district court in *McLaughlin v. Pernsley*, 693 F. Supp 318 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3d Cir. 1989) (Pet. Br. at 17-19), are not holdings of the Third Circuit Court of Appeals. The district court found that a race-based transfer of a foster child violated the plaintiffs' equal protection and due process rights. The latter finding was based on the governmental defendant's failure to follow a regulation providing certain foster parents with procedural protections. 693 F. Supp. at 325-27. The district court held that the foster parents "did not

receive any of these procedural rights entitled to them under this regulation by virtue of the Due Process Clause. Under these circumstances, this Court is obligated to find that the Department of Human Services' conduct violated plaintiffs' due process rights." *Id.* at 327. Since it is well-settled that procedural requirements do not create constitutionally protected interests, *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983), the district court's ruling was erroneous.

Petitioners label as a "specific substantive predicate[]," a provision in the Pennsylvania regulations at issue in *McLaughlin* making them applicable only to " 'qualified' foster parents" (Pet. at 18), but a definition of the group of people entitled to procedural rights is not a substantive predicate. The regulation did not attempt to spell out the predicate facts that would lead to a child's removal from a foster home.

In any event, the court of appeals did not address these issues. The government did not appeal in *McLaughlin*, 876 F.2d at 312, and the court of appeals emphasized that it was not reviewing the district court's "unchallenged" analysis of the constitutional issues. *Id.* at 318. In passing, it is noteworthy that a district court with such an expansive view of state-created liberty interests nevertheless cited *OFFER* for the proposition that an argument for a liberty interest arising "from the Due Process Clause itself . . . might have little force." 693 F. Supp at 325 (citation omitted).

Nor is there a conflict between the court of appeals' decision here and other decisions cited by

petitioners as evincing use of the supposedly "less restrictive 'expectations of permanency' test in the foster care removal context" (Pet. at 20). Two of the three cited decisions, *Thelan v. Catholic Soc. Servs.*, 691 F. Supp 1179 (E.D. Wis. 1988), and *Brown*, 601 F. Supp 653 (Pet. at 21), are district court opinions, not those of a court of appeals, and as previously noted, *Brown*'s reasoning has been rejected by the court of appeals for the circuit where the *Brown* court sits (*supra* pp. 11-12). And as petitioners acknowledge, *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1989), did not "explicitly decid[e] whether the plaintiff preadoptive foster family had a liberty interest in their relationship" (Pet. at 20).

Finally, Andrew had no independent liberty interest in remaining in the Rodriguez home. The fact that a child might be harmed by an improvident change in custody does not create a constitutionally protected liberty interest in the status quo. *OFFER*, 431 U.S. at 840; *see also Reno*, 507 U.S. at 304-05. In the context of temporary foster care placements, one court of appeals has held that young foster children like Andrew do not have a constitutionally protected "stability interest." *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1208 (5th Cir. 1977)

> [T]he state's motive in interrupting [the child's] environment at any point was always to move him to a place which it considered superior, over the long range, for his particular needs at the time. Since [the child] can point to no source for a right in conflict with that state program, we hold that [the child] has no liberty interest as asserted here.

563 F.2d at 1209. New York's child-care statutes also focus on a child's best interests and did not create any expectation for Andrew that his interests would best be served in any particular manner (*supra* pp. 16-20).

This is not to say that child-care agencies always know best and are empowered to exercise unrestrained discretion. New York provides ample avenues for administrative and judicial review of agency decisions so that the goal of serving a child's best interests can be achieved in as high a percentage of cases as possible. *See, e.g.*, N.Y. Soc. Serv. Law §§ 392, 400; N.Y. Fam. Ct. Act § 1055.

In this very case, New York's review procedures led to a decision returning Andrew to petitioner Rodriguez's home after a full investigation determined that the inadequate supervision that led to his removal was not a recurring problem. The jury's award of $1 nominal damages to Andrew belies any claim that he was devastated by these events.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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